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ABSENTEE.

1. A non-resident may appeal from a judgment rendered against him on attachment any time within two years from the date thereof.
Schmidt & Ziegler v. First National Bank of Selma, 314.
2. In an action upon a joint obligation, all the parties thereto must be made parties to the suit. C. C. 2080, 2081, 2082.
Hyde v. Marcy, 383.
3. Where, therefore, a suit was brought in New Orleans, upon a joint promissory note, made there, and one of the defendants in such suit, an absentee, who had neither a residence nor property in Louisiana, was cited through a curator *ad hoc*. Held—That he was a necessary party; that the only course left was to appoint for him a curator *ad hoc*, and that he subjected himself to this eventuality by signing the agreement in suit. 5 An. 674. *Ib.*
4. Whether or not such a judgment, as against the absentee, can have any extra territorial effect, it is not, in Louisiana, a nullity. *Ib.*

ACCOUNT.

1. A commission merchant who purchased a mortgage note for one of his customers, for which he charged the amount in his account current, can not afterwards, and after the maturity of the note, transfer it and convey title to a third party. A third party getting possession of the note under such circumstances, can only hold it subject to whatever equities might be urged against the original owner.
Gribble v. Haynes, 141.
2. Where the wife separated in property from her husband, has instructed her factor to purchase a mortgage note having a superior rank to her claim, on the property of her husband, which note the factor transfers to a third party after maturity, she may intervene in the suit to enforce payment, and be declared the true and legal owner thereof. *Ib.*

ACTION.

1. No action lies to recover rent for the lease of a house to be used as a brothel.
Kathman v. Walters, 54.
2. In an action to recover the value of a lot of cotton from the defendants, who, it is alleged, had it on storage, failed to deliver when demanded, the evidence showed that the claimants were not, and never had been, the owners thereof. Held—That not being owners they could not recover the value on account of non-

ACTION—Continued.

delivery. That to enable them to recover under this allegation, they must establish title to the cotton by evidence. Litigants must be held to the issues presented by their pleadings.

Levi v. Silverstein, 363.

3. The character of the action is determined by the prayer of the petition, and if suit is brought for damages, or the value of the property, with interest, *in solido*, alleged to have been received by the defendants, the action is prescribed by one year.

Bender v. Looney, 488.

4. The action accorded to a surety to have a personal recourse against his principal for whom he has paid, is only prescribed by ten years.

Cleveland v. Comstock, 597.

5. A ruling of the court, refusing an intervention, if correct at the time it is made, does not afterwards become incorrect by the party changing his character from that of an individual to that of a representative. Nor can a party, by way of intervention, compel other parties to litigate for his benefit or gratification. *Ib.*

ADMIRALTY.

1. The State courts are without jurisdiction to enforce a privilege given by law on vessels for the recovery of damages for a maritime tort. In such cases an admiralty lien is created which can only be enforced in the courts of the United States. 4 Wallace, 424, 561.

Youny v. Ship Princess Royal, 388.

2. A claim for damages *ex delicto* can not be enforced by attachment. 12 An. 110. *Ib.*

3. In an action for damages against a vessel for a collision, no judgment can be rendered against her if the evidence shows that she was not in fault, and that she was, at the time of the collision, under the control of a tugboat. *Ib.*

4. A contract for materials furnished and repairs done to a steamboat or other vessel in the home port is not a maritime contract, therefore the admiralty courts of the United States, have not exclusive jurisdiction to enforce a lien arising from such a contract.

Southern Dry Dock Company v. Gibson, 623.

5. By the home port of a vessel is meant the port or place of her permanent registry and enrollment, and the place where every act of sale or mortgage must be recorded to give it effect against third persons. *Ib.*

6. The States are competent to create such liens as their Legislatures may deem just and expedient in favor of furnishers of supplies and materials used in the construction and repairing of vessels, and to enact reasonable rules and regulations prescribing the mode of their enforcement, provided they do not amount to a regulation of commerce between the States. *Ib.*

ADMIRALTY—Continued.

7. Where suit is brought in a State court to enforce a lien on a vessel, which lien is given by statute, and the owners of the vessel except to the jurisdiction on the ground that the lien is an admiralty one, which the State court is without jurisdiction to enforce, the State court will, in case of doubt, maintain its jurisdiction. *Ib.*

ADMINISTRATORS.

SEE EXECUTORS AND ADMINISTRATORS.

AGENT AND AGENCY.

1. The principal is not bound by the receipt of his agent, when it is shown that the agent has been deceived by false representations of the debtor. In such a case the principal may recover from the debtor the balance due, after deducting the amount paid to the agent in full settlement of the demand.

Bayly and Houston, Curator, v. R. H. and G. M. Bayly, 17.

2. A party acting as agent or employe for a number of heirs in the prosecution of a land claim, under an agreement and contract, may withhold the payment of so much of the proceeds of the sale of the land, which he has received for them, as will be necessary to cover possible liabilities on account of suits brought by settlers for improvements made on the land, unless the heirs give satisfactory security against loss, resulting from such suits.

Heirs of Bastable v. Succession of Denegre, 124.

3. Loyal Case and the heirs of Bastable made a contract whereby Case was to prosecute their claims to the lands in the Bringier grant, in the parish of Concordia, Louisiana, and defray all expenses incident thereto, for one-half of the land recovered. After judgment was obtained in favor of the heirs, Case sold and assigned his contract to James D. Denegre. Held, by the court, that under this contract neither Case, nor his assignee, was responsible for the taxes on the land prior to the recovery of possession by the heirs, nor for claims for improvements made on the lands. That these claims constituted an incumbrance on the land itself, and was not included among the expenses which Case bound himself to defray in establishing their rights to and recovering possession of the lands claimed. *Ib.*
4. An agent or mandatary receiving notes for the sale of property belonging to his principal, becomes personally responsible if he fails to use due diligence in enforcing their collection. *Ib.*
5. A contract between a planter and a factor or commission merchant, whereby the latter binds himself to furnish the necessary supplies for the working of the plantation, not to exceed a specified amount, and to receive and sell the products of the place for the benefit of the planter, is a contract of agency on the part of the merchant, which terminates at the death of the agent. By the death of the

AGENT AND AGENCY—Continued.

agent, in such a case, the planter is absolved from all obligations to continue the contract, and the heirs of the agent are not bound on the contract. Such an agreement is personal, and not heritable. *Shiff v. Succession of Lesseps*, 185.

6. Where the agent of a planter has died, and the surviving wife forms a commercial partnership, with third parties, who assume the contract of agency which was terminated by the death of the agent, it was held by the court that the rights of the heirs to the estate of their deceased father became fixed at his death, and that the surviving wife, in her capacity of tutrix, could not bind their estate for liabilities of the new firm growing out of the contract of agency which terminated at the death of their father. *Ib.*
7. Where the evidence shows that the owner of a promissory note placed it in the hands of commercial agents for the purposes of negotiation, and the agents afterwards bring suit as owners, the maker of the note can plead all the equities in the suit that may exist against the original holder and owner, although it may be shown that the note came into their possession, as agents, before maturity. *Sinnot & Adams v. Schlater*, 201.
8. An agent can not relieve himself from responsibility for moneys which he has collected for his principal by showing that he has invested them in the purchase of cotton for his own account, with the sanction of his principal. He must show, in addition, that he has turned over the cotton to the principal, or that the principal has authorized him to retain it. *Moncheux v. Mistrot*, 421.
9. A payment made on a promissory note by an agent, without authority from the debtor, will not interrupt prescription. *Smith v. Coon*, 445.
10. A renunciation or waiver of prescription by the administrator, after prescription has accrued, is null, as against the estate. 21 An. 373. Therefore, if the administrator had made a payment on the note, as agent, without authority, before prescription accrued, he had no authority to ratify the act, as administrator, after the note was prescribed. *Ib.*
11. An agent can not be made liable for a note placed in his hands for collection, if it be shown on trial that the original consideration thereof was the price of a slave. *Little v. Johnson*, 474.
12. Agents acting under a *quasi contract* are not liable for interest and expenses incurred on the property in their hands, nor are they liable *in solido*. *Bender v. Looney*, 488.
13. An agent is not accountable to his principal, nor to the legal representatives of the principal, for rents which he collected during the war in Confederate notes, with the knowledge and approval of the principal. *Turner v. Beall*, 490.

AGENT AND AGENCY—Continued.

14. An agent can not contract a loan, acknowledge a debt, alienate or mortgage the property of his principal, or do any other act of ownership, without express and special authority. But if the agent, under a general authority, sells property, the produce of the plantation under his charge, the principal must notify the purchaser, as soon as he is informed of the fact, that he rejects and repudiates the acts of his agent as unauthorized.

Ball v. Bender, 493.

15. The contract of mandate may be tacit, as well as express, and the acts of the principal must be fairly and liberally construed towards those who contract with the agent, as well as towards the agent. *Ib.*

16. An agent is accountable to his principal for moneys that came into his hands as such, even if such amount be composed of usurious interest, and not collectable by the principal himself.

Chinn v. Chinn, 599.

17. An agent who, when it becomes his duty to deposit, in bank, the money of his principal, fails to make the deposit in the name of his principal, becomes personally liable for the amount. In such a case the agent will not be permitted to urge the failure of the bank after the deposit was made, and throw the loss on the principal. C. C. 3002, 3003.

Norris v. Hero, 605.

SEE CONFEDERATE NOTES—*Bank of New Orleans v. Franton*, 462.

ALIMONY.

1. A preponderance of testimony in favor of a marriage, is sufficient to base a judgment for alimony, pending the suit for divorce; but such judgment, rendered on rule, will not preclude the husband from urging the plea at the final trial that there was no marriage.

Fisk v. Fisk, 401.

2. The grandmother, being in destitute circumstances, and without the means of support, is entitled to an allowance as alimony from the estate of her grandchildren. This allowance should be made by the executrix or administratrix, when required, although the amount of the estate of the heirs be not yet definitely ascertained.

Succession of Lyons, 627.

3. The law does not require alimony to be given by the rich alone. But, in fixing the amount, the circumstances of those who are to pay and those who are to receive must be taken into consideration. *Ib.*

4. An allowance of alimony should begin only from the date at which a necessity of the demand exists. Therefore, if it be not shown that the grandmother was in necessitous circumstances prior to making her application, she will only be allowed alimony from that date. *Ib.*

APPEAL.

1. A party wishing to stay the execution of a judgment directing the seizure and sale of mortgaged property by a suspensive appeal, must give bond within the time allowed in an amount one-half over and above the amount of the order, the same as in an ordinary judgment for a fixed amount.

State, ex rel. Bankhead, v. Judge of Seventh District Court, parish of Orleans, 35.

2. If the district judge has committed an error in fixing the amount of the bond for a suspensive appeal from an order of seizure and sale, the appellee is entitled to proceed with the execution of the judgment, and a writ of prohibition will not issue restraining him from executing the order pending the appeal. *Ib*
3. If no legal ground is shown for the appeal, the appellant will be condemned to pay damages for frivolous appeal, when prayed for by the appellee. *Baldwin v. Green, 53.*
4. Where the appeal is taken for delay only, damages will be awarded the appellee for frivolous appeal.

Owners of the Steamer General Quitman v. Packard—Ober, Attorney & Co., Intervenor, 70.

5. The certificate of the clerk, that the record contains all the evidence adduced and filed in the matter, is defective, and the appeal will be dismissed on motion. *Succession of Sanderson, 83.*
6. A district judge of the parish of Orleans will be compelled by mandamus to grant a suspensive appeal from a final judgment rendered on default, if the appeal is applied for within ten days from the service of notice of judgment, provided the case is in other respects appealable.

State, ex rel. Lobdell, v. Judge of Fourth District Court, parish of Orleans, 90.

7. A party who voluntarily executed a judgment directing the sale of his mortgaged property is not permitted to appeal from it. *Sims v. Lawes, 105.*
8. An appeal will not be dismissed on account of the neglect of the clerk to issue, or the sheriff to serve citation of appeal. *Gallagher v. Thomas, 112.*

9. A writ of prohibition will not issue to restrain the execution of a judgment of the court below, where the record shows that the bond given for the appeal is insufficient in amount to operate a *supersedas* pending the appeal.

State, ex rel. Wassell, v. Judge of Fourth District Court, parish of Orleans, 115.

10. To entitle a party to a suspensive appeal from a judgment for money, he must give a bond for one-half over and above the amount of the judgment. An intervenor or third party wishing to appeal must comply with the same conditions. *Ib.*

APPEAL—Continued.

11. An appeal from a judgment dismissing a dative testamentary executor from office will not suspend execution, and a mandamus will not lie to compel a suspensive appeal from such judgment.
State, ex rel. Commagere v. Judge of Second District Court, parish of Orleans, 116.
12. A bill of exceptions, taken from the ruling of the judge dismissing an intervention, can not be examined on appeal from a final judgment between the original parties, and a writ of mandamus will not lie to compel the judge *a quo* to sign such bills.
State, ex rel. Sharp and Gellen, v. Judge of Sixth District, parish of Orleans, 176.
13. In an attachment suit, where the property attached has been sold, and the proceeds thereof are in the custody of the sheriff, a third party, on disclosing an interest that entitles him to appeal from the judgment in favor of the attaching creditor, should be allowed to do so on giving bond in an amount fixed by the judge.
Ib.
14. In fixing the amount of the bond, reference should be had to the amount of costs for which the third party appellant would be liable, together with the possible amount of damages in case of frivolous appeal.
Ib.
15. If a bond is tendered, which is not sufficient in amount, the judge should fix the amount. In case the judge refuses, the Supreme Court will, on application, fix the amount of the bond, and issue a mandamus directing the judge to grant a suspensive appeal. *Ib.*
16. An appeal will not lie from a final judgment until it is signed by the judge.
Sibley v. Fernie, 188.
17. If a party takes a devolutive appeal from a final judgment and gives bond, and afterwards abandons it, he can not be permitted to take a second appeal on giving a new bond.
Sharkey v. Bankston, 199.
18. An appeal will lie from an interlocutory judgment of the probate court, rendered on a rule against the executor to show cause why the sale of certain property should not be stopped, and a writ of mandamus will, on application, issue to the judge to send up the record. *State, ex rel. Fassman, v. Judge of Second District Court of New Orleans, 200.*
19. An appeal will not lie from an interlocutory judgment, where it is not shown that irreparable injury would follow.
Woolfolk v. Woolfolk, 206.
20. Mere delay will not authorize the intervention of the appellate court.
Ib.
21. If the interlocutory judgment is erroneous it may be corrected on appeal from the final judgment in the cause.
Ib.

APPEAL—Continued.

22. An appeal will not lie from a judgment for the exact amount of five hundred dollars. Constitution, article 74.
Keep & Hogan v. Harrison, 218.
23. A surety on an attachment bond is no party to the suit, and need not be made a party to the appeal taken by the defendant from the judgment in the attachment suit. *Campbell v. Clark*, 242.
24. Where the evidence in the record leaves the questions in dispute in doubt and uncertainty, the Supreme Court will remand the cause for a new trial. *Ib.*
25. An appeal will not be dismissed because the certificate of the clerk to the record is informal. Acts of 1866, No. 82, § 16, p. 154.
Flint & Jones v. Peck, 246.
26. Where the original note sued on has not been offered in evidence, and the defendant seeks a new trial, the case will be remanded. *Ib.*
27. An appeal will not lie from an interlocutory judgment on a rule to dissolve an attachment, unless it is shown that such a judgment would work an irreparable injury. *Mesritz v. Marks*, 249.
28. Where the appellant fails to prosecute his appeal, and the record discloses no grounds for the appeal, damages will be awarded the appellee for frivolous appeal. *Lusse v. Mische*, 256.
29. Where separate appeals are taken by the principal and surety on the bond from a judgment *in solido* dissolving an injunction, the principal in injunction, if solvent, is a good and legal surety on the appeal bond given by the surety in the injunction. As a general rule the only question to be considered in determining the sufficiency of the bond is the solvency of the surety.
State, ex rel. Wilson, v. Judge Seventh District Court, parish of Orleans, 262.
30. A suspensive appeal taken by the principal in injunction will not suspend execution of the judgment against the surety on the injunction bond. *Ib.*
31. A motion to dismiss an appeal comes too late, if not made within three days after the record is filed. 19 An. 276; 2 An. 133.
Murrison v. Seiler, 327.
32. If the amount involved is under five hundred dollars, the appeal will be dismissed for want of jurisdiction. Constitution, art. 74.
Case v. Hurley, 333.
33. Where an appeal is taken by petition from an injunction suit, and the appellant fails to have the surety on the bond cited with other parties, the appeal will be dismissed for want of proper parties. The surety on the injunction bond is a necessary party to the appeal, and must be cited. *Avegno v. Johnston*, 400.

APPEAL—Continued.

34. The Supreme Court will *ex officio* notice the fact, and dismiss the appeal, if the amount claimed does not exceed five hundred dollars at the time judicial demand was made. *State v. Dopf*, 400.
35. No appeal lies from a judgment not signed by the judge *a quo*. C. P. 546; 3 An. 62; 12 An. 756. *Trost v. Fox*, 410.
36. An appeal does not lie from a judgment not signed by the judge *a quo*. *Storrs v. Thompson*, 410.
37. After an appeal is granted, and the bond given and filed in the record, the jurisdiction of the court *a qua* ceases, except to test the solvency of the surety on the bond. Therefore, a second order, rendered afterwards by the judge *a quo*, changing the return day, and granting further time to the appellant, is a nullity, and the appeal will be dismissed, if not filed in the Supreme Court, within the time allowed under the first order.
State, ex rel. Belden, v. Mahan, 449.
38. If the appeal is taken in open court in a case where the judge *a quo* is required to fix the amount of the bond, the order fixing the amount of security must be entered on the minutes of the court with the order granting the appeal. C. P. 573, 574.
Norris v. Warren, 458.
39. Where the appeal is granted, on motion in open court, and the bond is given in favor of the clerk, all the parties to the suit, who are not appellants are appellees, and the appeal will not be dismissed for the want of proper parties. *Ward v. Douglass*, 463.
40. The Supreme Court can only take jurisdiction of appeals from parish courts, in probate cases, when the amount involved is above five hundred dollars. Therefore, no appeal will lie to the Supreme Court from a judgment of the district court, rendered on appeal from the parish court.
Tippit v. Lippmins, 465.
41. In a suit under the intrusion act of 1863, No. 156, wherein the right to office is the subject of controversy, and the suit is commenced and prosecuted in the court below, in the name of the State, with the name of the claimant to the office joined in the action, with a prayer that he be declared the true and legal officer, and an appeal is taken from the judgment by the State, such claimant must be made a party thereto. Therefore, if an appeal has been taken from such a judgment by the State alone, it will be dismissed for want of proper parties; the fault being imputable to the appellant.
State, ex rel. Belden, Attorney General, v. Blandin, 467.
42. An error of the judge *a quo* in fixing the date at which interest begins to run, will be corrected on appeal, and the appellee will be condemned to pay the costs of the appeal.
Heard v. Wynn, 469.

APPEAL—Continued.

43. Where an appeal has been granted, and is still pending in the Supreme Court, the court *a qua* is without jurisdiction to grant a second appeal from the same judgment.

Succession of Pomeroy, 518.

44. If a suspensive appeal has been granted by the judge of the district court and the bond has been given and filed in the record, the district judge is not competent to dismiss the appeal without first ascertaining by evidence whether the surety on the bond is good and solvent. The failure of the appellant to qualify his surety is not sufficient to authorize the district judge to dismiss the appeal and order execution to issue.

State, ex rel. Roman, v. Judge Sixth District Court, parish of Orleans, 591.

45. An appeal being a constitutional right given to every litigant, the Supreme Court will, on application for a prohibition against the inferior jurisdiction, examine the evidence offered touching the solvency of the surety on the appeal bond, and review the judgment of the court *a qua* dismissing the appeal because the surety is not good and solvent. *Ib.*

46. The Governor is the proper representative of the State and bound to protect her interests, therefore in a case where the other officers, such as the Attorney General or other officers, are absent from the State or fail to discharge their duties in taking an appeal, the Governor is bound to intervene in behalf of the State and take the appeal.

State, ex rel. Mahan, v. Dubuclet, State Treasurer, 602.

47. An appeal will lie from a judgment against the State when the affidavit shows that the injury done by the judgment is above five hundred dollars. *Ib.*

48. The appeal will be dismissed if the record fails to show that the amount in dispute exceeds five hundred dollars.

State, ex rel. De St. Romes, v. Levee Steam Cotton Press Company, 622.

49. The affidavit by the appellants that they feel an interest in the matter at issue, exceeding five hundred dollars, and that the right to control the books of the company exceeds in value five hundred dollars, is not sufficient to give the Supreme Court jurisdiction of the appeal. *Ib.*

APPEAL BOND.

1. A surety on an appeal bond may limit his liability by a stipulation to that effect. 21 An. 447, 730.

Heirs of Bastable v. the Succession of Denegre, 124.

2. The appeal bond must be made payable to the clerk of the court from which the appeal is taken, otherwise the appeal will be dismissed for want of a legal bond. Acts of 1869, page 11.

Jaffray v. Bruff, 133.

APPEAL BOND—Continued.

3. The statute requiring all appeal bonds to be made in favor of the clerk of the court from which the appeal is taken is satisfied, if the bond is made in favor of the judge, the clerk and the appellee.

Ogier v. Marchand, 133.

4. Where a case has been erroneously transferred from the district to the parish court, and an appeal is taken from the judgment rendered by the parish judge, who was without jurisdiction, the case will be remanded to the district court to be proceeded with according to law. *Ib.*

5. Where a judgment of nullity has been rendered at the suit of the creditor against the husband and wife, avoiding the judgment of the wife against the husband, and canceling the sale of real estate by the husband to the wife in payment thereof, the judge *a quo* must fix the amount of the bond for a suspensive appeal. C. P. 577. And in case of refusal, a mandamus will issue, on application of the relator, compelling him to fix the amount of bond and grant a suspensive appeal.

State, ex rel. Parks, v. Judge of Seventh Judicial District, 589.

6. In fixing the amount of the bond for a suspensive appeal, where the title to real estate is involved, and no judgment for money has been given, the judge *a quo* must take into consideration the estimated value of the revenue to be derived from the use of the property, and such further amount as he may determine, as surety for injury or deterioration which the estate may suffer while in possession of the appellant, and fix the bond in an amount exceeding by one-half such estimate. *Ib.*

7. The amount of the bond for a suspensive appeal must be one-half over and above the amount of the judgment including interest which has accrued thereon up to the filing of the bond.

Marchand v. Casanave, 626.

8. An appeal bond which is not sufficient in amount to exceed by one-half the amount of the judgment, including interest which has accrued, is not conditioned as the law directs, and the appeal will, therefore, be dismissed on motion. *Ib.*

ATTACHMENT.

1. Where property has been attached and released on bond, and judgment has been rendered, the surety on the bond of release may show, on a rule to make him liable on the bond, that the property attached did not belong to the original defendant at the date of the seizure. *Bauer v. Antoine*, 145.

2. A creditor of a part owner of a vessel, a non-resident, may proceed against the vessel by attachment when she enters the port, and he can not be held liable for the expenses incurred, or damages caused by the detention pending the decision of the attachment suit. *Sibley, Guion & Co. v. Fernie, Brothers & Co.*, 163.

ATTACHMENT—Continued.

3. In case the interest of one of the owners of the vessel is sold at the suit of the attaching creditor, no privilege exists on the proceeds for expenses incurred or supplies furnished during the detention or previously. *Ib.*
4. A party plaintiff in a rule, by alleging that a third party is an attaching creditor, and makes such party a defendant in the rule, is estopped from denying that he is a creditor; and such attaching creditor has the right to appeal from the judgment on the rule. *Dalton v. Viosca and Weber, 251.*
5. A non-resident may appeal from a judgment rendered against him on attachment any time within two years from the date thereof. *Schmidt & Ziegler v. First National Bank of Selma, 314.*
6. The act of Congress, approved June 3, 1864, entitled "An Act to provide a national currency, secured by the pledge of United States bonds," gives to the United States a first and paramount privilege upon all the assets of a banking association organized under the act, to reimburse to the United States the amount expended in paying the circulating notes of such banking association. Therefore, the privilege given to an attaching creditor over the assets of the First National Bank of Selma must be postponed to that of the privilege of the United States, where it is shown, as in this case, that the Louisiana National Bank, a debtor of the First National Bank of Selma, had notice of the claim of the United States on the assets of the First National Bank of Selma before the seizure by the creditors under the attachment. *Ib.*
7. The bonding of property under seizure, in order to regain the possession thereof, is no bar to subsequent proceedings to set aside the writ of attachment, and release the surety on the bond. *Edwards v. Prather, 334.*
8. The surety on a bond of release of property attached may, before making any payment, bring suit against the debtor to indemnify him for the liability incurred in signing the bond. But to enable him to sustain such an action he must bring himself within the requirements of the law conferring the right to demand indemnity, viz: 1. When there exists a lawsuit against him for payment. 2. When the debtor has become bankrupt. 3. When the debtor was bound to discharge him within a given time. 4. When the debt has become due by the expiration of the time for which it was contracted, etc. *C. C. 3026. Ib.*
9. If an attachment has issued against a debtor before the debt is due, and the evidence shows that he intended leaving the State, permanently, the attaching creditor can not be compelled to pay damages, although the attachment has been dissolved.

Hathcock v. Gray, 472.

ATTACHMENT—Continued.

10. An attachment may be levied on goods stored in a warehouse, without making the warehouse keeper a party by garnishment process. And the attaching creditor has his lien on the property from the date of seizure, under the writ.

Trounsteln v. Rosenham, 525.

11. An attachment taken out under the act of 1868, entitled "An Act to provide additional grounds for attachment," will be dissolved on motion, if the facts shown on the trial fail to establish the allegations of the petition.

Moulor & Dumestre v. Rosengarden, 531.

12. In an attachment suit there is but one party, the defendant, whose property has been attached, who has the right to give a release bond. Therefore a bond given by the intervenor to have the property released, not being given in pursuance of any law authorizing it, is not a judicial bond, and the sureties thereon are only bound according to the terms and conditions of the bond.

Dawson v. Morton & Williamson, 535.

SEE APPEAL—*Mesritz v. Marks*, 249.

Campbell v. Clark, 242.

ATTORNEYS AND ATTORNEYS' FEES.

1. An attorney at law having possession of assets of the seized debtor, is not excused from answering interrogatories by the seizing creditor, and if the answers are traversed by the attaching creditor, an appeal will lie from the judgment given on the testimony offered to show their incorrectness.

Daigle v. Bird.—*Greves, Garnishee*, 138.

2. An attorney at law having claims in his hands for collection is entitled to an allowance for his fees for collection in case they have been garnisheed in his hands. *Ib.*

3. The judgment creditors instructed their attorney to bid on property seized in their name. The property sold on twelve months' credit, and the attorney gave a twelve months' bond, as the attorney in fact of his clients, for the price bid. The judgment creditors took the property. Pending the seizure other creditors had asserted a privilege on the property seized superior to that of the seizing creditors. The seizing creditors seek to avoid their liability on the bond, on the ground that the attorney who signed it was without authority to do so. Held—That although the attorney, as such, could not bind his clients on the bond, yet their accepting the property purchased by him at the sale under their instructions, was a ratification of his act in signing the bond, by which they were bound.

Slocumb v. Cage, 165.

4. Attorneys employed by the executor to attend to the litigations in which the estate is, or may be involved, are entitled to a fair and liberal compensation for their services. *Succession of Day*, 366.

SEE EVIDENCE—*Voorhies v. Harrison*, 85.

SEE INTERROGATORIES—*Daigle v. Greves*, 138

BANKRUPTCY.

1. After a certificate of discharge has been obtained by the debtor from the bankrupt court of the United States, in conformity with the bankrupt act of 1867, section 34, no judgment can be rendered in the cause by the State court, except one of dismissal.

Viosca v. Weed, 218.

2. A certificate of discharge in bankruptcy, from the United States Bankrupt Court, extinguishes all judgments and claims of a personal character against the bankrupt.

Murphy v. Smith, 441.

3. Therefore an ordinary *feri facias*, on a personal judgment against the bankrupt after the certificate in bankruptcy has been given, is without any legal force or effect, and its execution will be restrained by a writ of injunction.

Ib.

BANKS AND BANKING.

1. The act of Congress authorizing the controller of the currency to appoint a receiver to take charge of any bank or association that has failed to redeem its circulating notes, and is in default, with full power to collect all debts due such bank or association, authorizes such receiver, when appointed, to sue for and stand in judgment in the courts of the country in all cases involving the collection of debts due such bank or association.

Case, Receiver, v. Berwin, 321.

BATTURE.

1. If the alluvion or batture which has formed on and is attached to a riparian tract or lot of land has attained a sufficient elevation above the waters to be susceptible of private ownership at the time of the sale, it does not pass with the sale of the land or lot, unless so expressed. But if it has not reached a sufficient elevation to render it susceptible of private ownership, then it passes to the vendee, who is invested with all the rights of accretion which the vendor had, without any expressions of the vendor, indicating its transfer.

Barre v. City of New Orleans, 612.

2. In this case the plaintiffs allege that they have lost the title to the lot on which it is claimed the batture has formed, by prescription, but they claim to be the owners of the batture, notwithstanding. The evidence failed to show that the batture had attained a sufficient elevation to render it susceptible of private ownership at the time the plaintiff parted with the ownership. Held—That they having lost their title to the lot itself, by prescription, could not recover the batture, even though the batture were shown to have been formed to an elevation sufficient to render it susceptible of private ownership, before they parted with the title by transfer to their vendee.

Ib.

BELLIGERENTS.

1. Parties residing on opposite sides of the lines of military occupation during the late war were prohibited from carrying on trade and commercial intercourse with each other, and all contracts or obligations resulting from such trade or intercourse are null and void, unless it is shown that such trade or intercourse was specially authorized by the trade regulations prescribed by the Secretary of the Treasury of the United States. *Beckwith v. Pierce*, 67.
2. A contract of charter of a steamboat, during the late war, made at New Orleans after the city came under the lawful control and power of the United States, to carry on trade with the city of Shreveport and surrounding country then under the control and power of the insurgent forces, is null and void, and no action lies to enforce it. *Mansfield v. McLearn & Church*, 216.
3. Permits given by the military commander of the Gulf Department to carry on trade with the insurgents and transport the respective commodities of commerce through the lines of military occupations, were without any legal force or effect. The act of Congress of July 13, 1861, gave to the President of the United States power, in his discretion, to license commercial intercourse between citizens residing within those sections of the country where the lawful authority prevailed and those districts where the insurgent forces held control. Under this statute, licenses or permits given by any other authority were nullities. *Id.*
4. On the thirteenth day of August, 1859, the Towboat Association of the City of New Orleans leased from the plaintiff two coal yards, with the buildings thereon, and wharves, situated on the west bank of the Mississippi river, near its mouth, for the term of five years, at a stipulated rate of rent to be paid annually, in advance. The rent was paid punctually up to the thirteenth of August, 1861. The civil war broke out at or about this time between the United States and the so-called Confederate States. The mouth of the Mississippi was blockaded by the United States navy, and the Forts Jackson and St. Philip, on opposite sides of the river, above the coal yards, were occupied and garrisoned by the insurgent forces, which military occupation by hostile forces prevented the lessees from using the coal yards from that date. The lessor brings this action for the rent due on the remainder of the term of the lease. Held—That by the occupancy of the premises and surroundings of the leased property by the two contending armies, the lessees were prevented from using them as a coal yard and depot; that this interruption amounted in law to a revocation of the lease from that date, and that no action would lie to enforce the payment of rent thereafter. *C. C. 2667.*

Bowditch v. Heaton, 356.

BELLIGERENTS—Continued.

5. All trade and traffic in articles of merchandise, between persons occupying opposite sides of the military lines during the late war, was expressly prohibited by acts of Congress. Section five, act of thirteenth July, 1861. Therefore all debts contracted and obligations given, on account of any such trade, are null, and no action lies to enforce them. 19 An. 328. 20 An. 241.

Webster & McKenna v. Mahoney, 593.

BILLS AND PROMISSORY NOTES.

1. A due bill, containing an unconditional promise to pay money, falls under the denomination of promissory notes, and is prescribed by five years. *Wardwell v. Sterne*, 28.
2. A proposition to extend the time of payment of a promissory note, unaccepted by the maker, will not discharge the indorser. *Lamayer v. Uter et al.*, 45.
3. The fact that the holder of a promissory note fails to bring suit promptly will not discharge the indorser, provided notice of non-payment is given at maturity. *Moore v. Britton*, 64.
4. Demand of payment of a promissory note must be made at the place of payment. Demand at any other place will not bind the indorser. *Ib.*
5. In a suit to enforce payment of a note against a banker in whose hands it had been placed for collection, who had failed to have it protested, whereby the indorser was discharged, the execution against the original maker with the return of the sheriff that no property was found, together with the certificates of the recorder that the maker of the note had no property standing in his name in the parish of his domicile are admissible in evidence to show that the maker of the note was insolvent. *Eichelberger v. Pike*, 142.
6. The indorser of a promissory note before maturity, made payable to himself, is bound to the holder as indorser, under the law merchant, and not as an ordinary surety. *Ib.*
7. The right to recover of a banker for failing to protest a note whereby the indorser is discharged is only prescribed by ten years. *C. C.* 3508. *Ib.*
8. An obligation to pay money to one of two persons named, on a day fixed, although it contains stipulations authorizing execution to issue in case it is not promptly paid at maturity, falls under the denomination of promissory notes, and is prescribed by five years. 21 An. 121. *Fort v. Delee and Reily*, 180.
9. Where the indorser of a promissory note has died at or about the time of the maturity of the note, but the fact is unknown to the holder or the notary, notice sent through the postoffice to the indorser, at her usual place of residence, will bind the heirs, if it

BILLS AND PROMISSORY NOTES—Continued.

be shown that they were in the habit of receiving letters there, and that they actually received from the postoffice the notice of protest addressed to their mother. Such notice is equally as binding as though it had been directed to the heirs by name.

Maspero v. Pedesciaux, 227.

10. If suit is brought by the holder of a protested draft against the drawer, as a member of the firm who are the drawees and acceptors, the fact that he is a member of such firm must be proved before judgment can be rendered against him as such.

Meeker v. Cummings, 317.

11. The failure to give notice of the non-payment by the acceptor of a draft will discharge the drawer. *Ib.*
12. The allegation of ownership of promissory notes in favor of a commercial firm which has since been dissolved by one of the partners, with a notarial transfer by the other partner, is a sufficient showing of ownership of the notes to entitle the holder to enforce their payment. *Levi v. Corkern*, 329.
13. If the principal obligation, such as a promissory note, be prescribed, the mortgage given to secure its payment falls with it.

Smith v. McWaters, 431.

14. An original holder of a promissory note, who has transferred it by indorsement, before maturity, can not be held liable, as indorser, unless he receives notice from the holder at maturity that the maker has failed to pay. But the holder can enforce the mortgage given by the maker to secure the note. *Ib.*
15. A party acting in the capacity of a general agent is not capacitated to waive notice and protest of a note indorsed by his principal. Such waiver is not binding on the principal, unless the power to make it is express and special. *Ib.*
16. Notes given for land and slaves can only be enforced for that portion which is ascertained to be for the land. And where the evidence in the record fails to show what portion is for land, and what for slaves, the case will be remanded, with instructions to the judge *a quo* to ascertain, by evidence, the relative proportion of each, and give judgment accordingly. *Ib.*
17. A promissory note given by a married woman, with mortgage on her paraphernal property to secure it, executed under the authorization of the district judge, according to the act of 1855, may be enforced against the wife, in the hands of a third holder, without showing that it inured to her advantage or benefit.

Miller v. Wisner, 457.

18. The holder of negotiable paper, indorsed in blank, is presumed to have acquired it *bona fide* before maturity, and the burden of showing the contrary falls on the party raising the question of ownership. *Ib.*

BILLS AND PROMISSORY NOTES—Continued.

19. The fact that the party accepting an act of mortgage has no interest therein does not affect the validity of the mortgage. 21 An. 3.
Ib.
20. Written documents, under private signature, are inadmissible in evidence until the signature is proved. *Ib.*
21. In a suit to make the indorser of a promissory note liable the holder may, under the allegation that due notice has been given, introduce parol evidence showing that demand has been made and notice given. The fact that protest has been made and notice given by the notary, does not preclude the holder from introducing other evidence of notice. *Dubuis v. Farmer*, 478.
22. The acts of the Legislature of 1855 and 1858, declaring that on all bills and notes made negotiable by law or custom, three days of grace shall be allowed, do not repeal or modify the general law merchant, which allows three days of grace on non-negotiable, as well as negotiable notes. Therefore notice to the indorser of a non-negotiable note is in time, if given at the expiration of the three days of grace allowed by the law merchant. *Ib.*
23. The Louisiana State Bank was the creditor of J. C. Patrick, and took as security therefor his notes, payable to and indorsed by A. D. Kelly & Co. The bank held these notes until after their maturity, and sold them, and placed the proceeds to the extinguishment of their debt against J. C. Patrick. About this time the bank was forced into liquidation by military order, and, by a provision of their charter, they were obliged to receive their own notes, (which were then at a heavy discount), in payment of debts due them. The purchaser of the Patrick notes, in pledge, and sold by the bank, paid for them in the notes of the bank. The indorsers on the notes, who now admit their liability, seek to discharge them by paying in the notes of the bank. That being the currency or paper in which the holder paid the bank for the notes who held them in pledge. Held—That it was no defense for the maker or indorser of a promissory note, in the hands of the present owner, that he might at one time, while the bank was the owner, have discharged it in the notes of the bank; that the holder of negotiable paper, transferred after maturity, is only liable to be met with the equities existing between the original parties. *Wynn v. Kelly*, 594.
24. Notes that have been given to the city of New Orleans for a lease of certain markets, secured by mortgage, which have been transferred by the city, and passed into the hands of third parties before maturity, can not be discharged in city notes. In such a case, the holder can recover from the maker the full amount in lawful currency.

Louisiana Mutual Insurance Company v. Batt & Cambon, 621.

BONDS.

1. The cancellation of the official bond of the sheriff by the Governor, and the erasure of the mortgage in the manner indicated by the act of March 12, 1855, discharges the sureties from all liability on the bond.

Lockwood, Voorhies & Co. v. Penn et al., 29.

CITATION.

1. A citation is good and sufficient if the copy of the petition accompanying it mentions the residence of the defendant, although it is not mentioned in the citation. *Succession of Marigny*, 171.
2. A deputy clerk in the parish of Orleans is competent to sign a citation, without the absence or sickness of the clerk being shown. *Ib.*
3. The dismissal of a suit for the non-appearance of the plaintiff is not an abandonment or voluntary discontinuance of the action. *Ib.*
4. Citation on one obligor *in solido* will interrupt prescription as to all. *Ib.*

CITY OF NEW ORLEANS.

1. The city of New Orleans gave a contract to fill up batture property with river sand, within a given time, with a penal clause empowering the city to annul the contract and forfeit payment for what work had been done, and to resell the contract in case of abandonment by the contractor, or failure to complete the work within the time prescribed. The contractor failed to complete the work within the time. The city failed to resell, but annulled the contract. Held—That under the stipulations of the contract the city was authorized to cancel it for failure to complete the work within the time, but not having resold it, she could not enforce the penal clause for damages against the contractor.

Bietry v. City of New Orleans, 149.

2. Where a contract has been annulled by the city of New Orleans on account of the failure of the contractor to complete the work within the time prescribed, his right to recover pay for work already performed will depend on the fact whether the failure was through his fault. If overpowering force, or an unusual high water occurred to interfere with the operations of the contractor, he would be entitled to recover pay for what work he had actually performed, although the contract was forfeited. *Ib.*

SEE CONTRACT—*Denton v. Reading*, 607.

CLERKS OF COURTS.

1. By article 133 of the constitution of 1868, clerks of courts are prohibited from exercising any judicial powers whatever, and the order of a clerk, after the adoption of the constitution, admitting a will to probate, is an absolute nullity.

Succession of Tanner, 91.

CLERKS OF COURTS—Continued.

2. A defendant who has taken a suspensive appeal from a judgment against him, and given bond, is not required to pay to the clerk of the lower court his fees for preparing the transcript before he can require the latter to deliver it. In such a case, the clerk who refuses will, on application to the Supreme Court, be compelled, by mandamus, to deliver the transcript, and pay the costs of the writ.

State, ex rel. Kearny, v. Clerk of Seventh District Court, parish of Orleans, 563.

3. Clerks of district courts are not permitted to demand the fees from the defendant for making a transcript of appeal in a case where judgment has been given in favor of the plaintiff and the defendant appeals.

State, ex rel. Bernard, v. The Clerk of the Sixth District Court of New Orleans, 578.

4. The act of 1870, page 161, which regulates the fees of clerks for making transcripts of appeals and authorizes them, upon complying with certain formalities, to issue execution against the principal and security for costs, has reference only to the party filing the suit, and applies to all costs to which clerks of district courts are entitled. *Ib.*

5. The act number thirty-five, approved sixteenth of March, 1870, which appropriates two thousand dollars for the payment of costs of suits where the State is a party and loses the case, does not apply to the payment of costs in suits brought by tax collectors to enforce payment of taxes against delinquents. Therefore, the Auditor of Public Accounts is not authorized, nor can he be compelled, by mandamus, to warrant against this appropriation, in favor of a clerk of a district court for his costs that have accrued in suits brought by tax collectors, to enforce the payment of taxes due the State. *Mahan v. Sundry Defendants, 583.*

6. Where an appeal bond has been given according to law, the clerk of the district court can not exact payment of his costs in money, or additional security from the appellant, as a condition precedent to the delivery of the transcript.

State, ex rel. Anseline, v. The Clerk of the Second District Court, parish of Orleans, 585.

7. In case the return day for filing the transcript in the Supreme Court has passed, through the fault of the clerk of the district court in refusing to deliver it, until his costs were paid, after the bond had been given, the time for filing the transcript will be extended, and the clerk will be compelled, by mandamus, to deliver the record, and pay the costs of the writ. *Ib.*

COMMON CARRIER.

1. The owners of a sea going vessel are responsible *in solido*, as common carriers, for money or gold taken on board as freight to be transported and delivered at the port of destination.

Sulakowski v. Flint et al., 6.

2. Where the evidence shows that the captain of the vessel received money on board of the ship as freight, and afterwards applied it to the payment of the expenses of the vessel on the trip, the owners of the vessel are liable *in solido*, for the amount thus received by the captain.

Ib.

COMMUNITY.

1. The surviving widow in community is not allowed to retain in her hands the amount of her bid on the common property, at the succession sale of her deceased husband, until a final partition, even where there are no debts to pay.

Prescott, Administrator, v. Gordon and Bates, 250.

2. Articles 1265 and 2603 of the Civil Code, which give to the heirs the right to retain the amount of their bids until a final partition, does not give to the surviving widow that right, at the sale of the community property. In this respect she stands in no better position than that of any other purchaser.

Ib.

3. The surviving wife is entitled to the usufruct of the community property during her widowhood, without accounting to the creditors for the rents and revenues arising from the use of the property, or the value of animals that perish from natural causes. The fact that she has qualified as administratrix, and administered the estate in that capacity, does not affect her rights as surviving spouse.

Boyle v. Sibley, 446.

4. The heir and widow in community have the legal right to partition and divide the community property.

Markham v. Allen, 513.

5. If a partition of the community property has been made between the heir and the surviving widow, a debt that was contracted by the husband before the marriage, is chargeable to that portion which has fallen to the heir, and not to the share of the community belonging to the wife.

Ib.

6. In this case the wife brought suit against her husband for a separation from bed and board, and for her share in the community. An injunction issued against the husband, restraining him from disposing of or otherwise using the community property pending the suit. The husband gave a bond, with security, conditioned that he would restore the community property in case it was finally decided that the wife was entitled to a separation from bed and board. On trial, it was decided that the wife have a judgment of separation from bed and board, and that the hus-

COMMUNITY—Continued.

band deliver to her, within ten days, her share of the community property, in default of which the husband and his surety on the bond were condemned, *in solido*, to pay the sum of eight thousand dollars. The defendant and surety took separate appeals. Held—That, the surety, not being a party to the suit for separation, the judgment rendered against him, condemning him solidarily with the husband to pay the amount of the wife's judgment, was a nullity as to him. It was further held that the judgment against the husband, being fully sustained by the evidence in the record, must be affirmed against him, with a reservation of all the rights of the wife to recourse against the surety on the bond.

Quirk v. Her Husband, 575.

CONFEDERATE TREASURY NOTES.

1. Payment of a promissory note, the consideration of which is shown to be a loan of Confederate notes, can not be judicially enforced.

Durbin v. McMichael, 132.

2. Payment of a note given in favor of an agent, and discounted by a bank in Confederate notes, and the proceeds thereof handed over to the maker of the note, can not be enforced. Constitution, article 127. The fact that the agent or factor of the maker of the note, who negotiated it with the bank, sent a small amount of groceries to the maker of the note, which he had purchased with a part of the proceeds, with the balance in Confederate notes, will not enable the bank to recover the amount of the supplies so furnished, they forming no part of the consideration for which the bank discounted and became the owner of the note.

Bank of New Orleans v. Frantom, 462.

3. The rule that courts will not enforce an obligation with an unlawful cause, is not affected by any confirmative acts of the debtor. Therefore, a recognition or acknowledgment by the debtor does not free it from the taint which the law has placed upon it. *Ib.*
4. A promissory note, given for Confederate notes or bonds as an equivalent, is void for want of a legal consideration.

Winter v. Jones, 485.

SEE AGENT—*Turner v. Beall*, 490.

CONSTRUCTION, RULES OF.

1. In interpreting agreements an elementary rule is to construe the clauses together, giving to each the sense which results from the whole instrument. *Escoubas v. Coal Oil Company*, 280.
2. Parties are put *in mora* by demanding that they do that which, in a legal sense, they ought to do and can do. *Ib.*
3. A distinction exists in this regard between a *modus* and a suspensive potestative condition. The former is obligatory and payable, and if the party bound is passively violating his obligation, he

CONSTRUCTION, RULES OF—Continued.

must be put in default before an action will lie. The latter is one whose accomplishment depends on personal choice; the party on whom it is imposed is free to accomplish it or not; and to put him in default would be a vain thing, since it would be to demand that he should do what he is under no obligation to do. *Ib.*

4. An agreement was made between plaintiffs, owners of mineral lands, and the assignor of defendants, of a twofold character, including a license to mine, and a lease for ten years in case of successful discovery. The defendants lost all rights thereunder by the lapse of time, no workable quantity of petroleum having been discovered within a period limited by the contract. The plaintiffs then agreed to refrain from declaring a forfeiture of this contract for ten years from its date, provided the defendants would carry on the search for petroleum constantly and without cessation. Held—That the latter agreement was conditional; that its conditional was suspensive and potestative, and that when the defendants failed to carry on their search for petroleum, the plaintiffs were entitled to declare the forfeiture of the contract by suit, and claim possession of their lands, without a formal putting in default. *Ib.*

5. In interpreting a patent to lands, issued by the Government to an individual, all its clauses must be construed, the one by the other, giving to each the sense resulting from the whole instrument. C. C. 1950. *Stewart v. Presley*, 514.

6. In an action of rescission, the party seeking relief must first offer to restore his adversary to the situation he was in before the contract. C. C. 1906; 3 An. 208; 14 An. 56, 474, 716; 21 An. 425. *Ib.*

SEE CRIMINAL LAW—*State v. Brewer*, 273.

CONTRACTS.

- 1 If a contract of building has been dissolved by the death of the undertaker, and the proprietor accepts the work done and materials furnished, he must account to the heirs for their value in the proportion they bear to the price agreed upon for the construction of the entire building. *Thomas v. J'Hote et al.*, 73.
2. A contract made under the authority of the police jury, to construct a private road across a tract of land in the parish, belonging to an absentee, stipulating that the land should pay the cost of construction, can not be enforced against the parish for the difference between the price which the land brought and the cost of making the road. *Young et al. v. The parish of Iberville*, 87.
- 3 An executed contract of transfer of a promissory note will not be set aside on the ground that the agreement or consideration of the transfer was contrary to public policy. In such a case the law will leave the parties where their conduct has placed them. 19 An. 498. *Leret v. Creditors*, 105.

CONTRACTS—Continued.

4. An overseer who has made a contract with the proprietor to manage his plantation for the term of one year, at a fixed price, on being discharged without any good and sufficient cause, before the expiration of the time, can recover the amount of the contract for the whole year. *Jones v. Jackson*, 112.
5. The custom of the neighborhood will not protect the planter against the legal consequences of the violation of his contract with the overseer. *Ib.*
6. A contract of sale of a lot of tobacco, the price of which is fixed at a certain rate payable in Confederate treasury notes, can not be judicially enforced. Constitution, article 127. Nor can the plaintiff, if he declares on such a contract, be permitted in the same action to recover on a *quantum meruit*, on showing the value of the tobacco in lawful currency. *Christian v. Baer*, 459.
7. In the year 1859 plaintiff entered into a contract with defendant for the sale of a certain valuable property in the city of New Orleans. At that time a suit was pending in the Third District Court of New Orleans between plaintiff and Woods for the ownership of the property. The conditions of the contract were that if the plaintiff was successful in the suit, he was to sell the property to Reading, the defendant, for \$20,000, fifteen hundred dollars of which was to be paid in cash at the termination of the suit by a final decision of the Supreme Court, or at the end of twelve months from the decision of the district court, if no appeal was taken. The remainder was to be paid in six equal annual installments consecutively, for which notes were to be furnished stipulating six per cent. per annum from date until maturity, and eight per cent. thereafter. It was further agreed that if the final decision be delayed beyond the eighteenth of June, 1860, the whole price should draw six per cent. per annum from that date. The suit was finally decided by the Supreme Court on the eighteenth of June, 1867. Held—That the latter clause or stipulation in the contract furnished the proper basis or data on which to predicate the calculation of interest; that under this clause interest from that date, the eighteenth of June, 1860, at the rate of six per cent. per annum, was due on the cash portion of the price, fifteen hundred dollars, and a like rate on the different installments, up to their respective maturities, and eight per cent. thereafter. *Denton v. Reading*, 607.

CORPORATIONS.

1. The act of the Legislature of 1870, No. 80, amending the act incorporating the town of Shreveport, which gives to the Board of Trustees power and control over the subject of licenses and taxes for the benefit of the corporation, has effect only prospectively.

CORPORATIONS—Continued.

Therefore an ordinance in force at, and before the passage of this act, assessing a license against all banks doing business within the corporation, is still in force, and the license so assessed must be paid. *City of Shreveport v. Johnson*, 519.

2. The purchase of a lot of cotton by a railroad company, chartered and domiciliated in the State of Mississippi, from a party domiciliated and residing in Louisiana, is not affected by the prohibitions contained in the act of the Legislature of 1855, a clause of which is as follows: "No corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock jobbing, exchange, or banking business of any kind." The clause in the act cited, only refers to the buying and selling of articles of merchandise as an employment, and implies operations, conducted with a view of realizing the profits which come from skilful purchase, barter, speculation and sale.

Graham & Anderson v. Hendricks, 523.

3. An ordinance of the corporation of Jefferson City levied a license tax of ten dollars on each cart used for the purpose of delivering bricks, lumber, etc., or hauling the same to or from their place of business, and provided for the enforcement of the same by penalties, recoverable before any court of competent jurisdiction. Under this ordinance the city seized certain carts belonging to the plaintiff, who was using them for hauling clay and sand from the batture across the street to the brick yard. Held—That, under the terms of this ordinance, the carts used for this purpose alone, were not liable to arrest under the penalties denounced therein.

Lilienthal v. City of Jefferson, 600.

4. A committing magistrate is not liable in damages for an error of judgment in deciding a cause, especially if the record discloses that he has jurisdiction of the subject matter of the controversy.

Ib.

CRIMINAL LAW AND CRIMINAL PROCEEDINGS.

1. The jurisdiction of the Supreme Court in criminal cases is limited to questions of law, and questions of fact as to the regularity of the drawing of the jury will not be examined on appeal.

State v. Bruington, 9.

2. In a verdict of guilty of murder, the jury added a recommendation of the prisoner to the mercy of the court. Held—That this addition was not a qualification of the verdict. *State v. O'Brien*, 27.
3. In a criminal prosecution for the crime of murder the witnesses for the accused may, under the plea of insanity, be permitted to give the jury the acts, declarations, conversations and exclamations they saw, had with, and heard the accused make at any time shortly before, at the time of, or after the killing. The objections to such testimony goes to its effect.

State v. Hays, 39.

CRIMINAL LAW, ETC.—Continued.

4. Previous or subsequent insanity will not discharge the accused. It must be shown to exist at the time the deed was done. *Ib.*
5. The answer of a juror on his *voir dire* to questions propounded by the accused, that from what he has read in the public prints he has formed an unfavorable opinion of the character of the accused, but that he has formed no opinion as to his guilt or innocence of the crime charged, does not disqualify him from sitting on the jury.
State v. Schnapper and Malone, 43.
6. Section sixteen of the acts of 1855 limits the district judge, when presiding over criminal trials, to giving to the jury a knowledge of the law of the case; but in doing this the judge may make such observations as tend only to aid the jury in their inquiries, abstaining from all comments on the testimony calculated to influence their minds in deciding upon the facts. *Ib.*
7. The statute of the State of Louisiana of 1805, adopting the common law of England as the basis of its criminal jurisprudence, is not affected by any enactments of that kingdom subsequent to that date.
State v. Davis, 77.
8. The statute of 21 George III., chap. 68, enacted prior to the year 1805, by which the taking of certain things attached to the realty is declared to be a felony, does not affect the definition of the word "larceny," as used in the twenty-eighth section of the act of March 14, 1855. *Ib.*
9. The term "larceny," as used in this statute, means the felonious taking and carrying away of the personal goods of another, without his consent, and with intent to convert them to the use of the taker. *Ib.*
10. The affidavit of the accused, after a verdict of guilty of murder, that he is not familiar with the English language, is not good cause for a new trial; nor will questions of fact, presented in the affidavit, be noticed on appeal. *State v. Orsini, 93.*
11. The charge of the judge to the jury, that "violence may be committed as well by actual unlawful force, as under pretense of rightful proceedings," could not mislead the jury, where no evidence was offered showing that the accused acted under legal authority in forcibly taking the money. *State v. Durbin, 154.*
12. In criminal trials all objections to the information or indictment of a strictly formal character must be urged before the jurors are sworn. Revised Statutes of 1855, section 91, page 177.
State v. Durbin, 162.
13. The decisions of this court being matters of record and publication, it will be presumed that the Legislature had them in view in using a repealing clause of a peculiar character which had been, by those decisions, repeatedly interpreted; and, even if the correctness of the interpretation be doubted, the interests of society in a

CRIMINAL LAW, ETC.—Continued.

case where the release of a convict is claimed in virtue of an alleged repeal of a criminal statute, demand an obedience to the rule, *stare decisis*. *State v. Brewer*, 273.

14. If a criminal statute be repealed, the prisoner who is being prosecuted under it must be discharged, even after judgment in the inferior court; but this rule is founded on the presumption of a legislative pardon, and does not exist where there is no room for such presumption. *Ib.*
15. As the revisory legislation of 1870 contained a repealing clause identical in effect with that of 1855, and as the latter was repeatedly decided not to have repealed the provisions contained in the statute itself, but, on the contrary, to have continued them in force, it follows, on precedent, that the former did not repeal a pre-existing statute relative to the crime of manslaughter, but, on the contrary, continued it in force. *Ib.*
16. It is not necessary in an indictment for larceny of money, to specify the kind or denomination of the gold or silver coin alleged to have been stolen. The simple averment of "money" in such a case will admit proof of the amount. Revised Statutes of 1856, p. 176, § 88. *State v. Walker*. 425.
17. In this case the indictment declares that the accused took money, and that its value was one hundred and fifty dollars. Held—That this averment placed the accused on his guard, and that his plea of guilty admitted the truth of the averments. *Ib.*
18. The accused was convicted of the crime of murder, and duly sentenced. Through his counsel, three bills of exception, were taken to the refusal of the judge to charge the jury as requested :
 I.—The court was requested to charge the jury "that where all the circumstances of the killing are shown, it devolves on the State to show that the killing was malicious, to make it murder." Held—That this charge was well calculated to mislead the jury by its vagueness, and was properly refused.
 II.—"That if the life of accused was not in danger, but he had a reasonable ground of believing that it was, at the time of the killing, he had a right to kill the deceased." Held—That this request, standing alone, as it does in the record, is erroneous as a legal proposition. That there are many instances in which a man may reasonably believe his own life in danger, without thereby acquiring the right to take the life of some one else. The charge was properly refused.
 III.—"That if the accused had a reasonable ground to believe from appearances, that his life was then and there in danger, and killed the deceased to save his own life, he was justified, although not attacked." Held—That the right of self-defense, in America,

CRIMINAL LAW, ETC.—Continued.

is sufficiently extended without giving it such a latitude as is implied in this request, and the judge did not err in refusing the charge. *State v. King*, 454.

- 19.—In this case the accused was indicted for the crime of burglary. On trial, his counsel requested the judge *a quo* to charge the jury: I.—That the circumstances necessary to convict must be as strong as the testimony of one witness, who swears positively that the accused did commit the offense charged. Held—That the judge did not err in refusing this charge; that the law furnishes no such rule for estimating the weight of circumstantial evidence as that suggested in this request.

II.—That, if the jury find that the accused was in the employ of the witness, as a clerk or a porter, at the time of the alleged commission of the crime, the fact of his being found in the store of witness is not presumptive evidence that the accused entered with felonious intent. Held—That the court did not err in refusing this charge; that the bill of exceptions only showed the refusal of the judge to charge the jury as to this particular fact, without disclosing the circumstances under which the accused was found the store, and was therefore properly refused.

State v. Coleman, 455.

20. In a criminal case no appeal lies, unless the accused has been sentenced to the punishment of death, or imprisonment at hard labor, or a fine exceeding three hundred dollars, is actually imposed. Constitution, article 74.

State v. Gary, 460.

21. In a criminal case only questions of law can be reviewed on appeal. Therefore the decision of the judge *a quo* on a question of diligence, raised by the accused in a motion for a new trial, can not be examined by the appellate court.

State v. Smith, 468.

22. In this case a bill of exceptions was taken to the ruling of the judge admitting the testimony of witnesses, not physicians, to prove the cause of the death of the deceased. Held—That the judge did not err in receiving the witnesses. That they were introduced to prove the actual infliction of the wounds by the accused, and the actual death of deceased. That the jury were to determine from the facts given by the witnesses whether deceased came to his death by the wounds given by the accused. *Ib.*

23. An appeal taken by the State in a criminal case will be dismissed for want of jurisdiction, if the accused has not been sentenced with the penalty of death, nor imprisonment at hard labor, and a fine exceeding three hundred dollars has not been actually imposed. Constitution, article 74.

State v. Fournet, 564.

24. Insanity, when pleaded in defense of a criminal act, such as homicide, must be clearly shown to have existed at the time of the

CRIMINAL LAW, ETC.—Continued.

commission of the act. Therefore, evidence of a witness, to show such a state of mental excitement in the accused, produced by the insulting language and threats used towards him by the deceased, his wife's paramour, at the time of the killing, is not admissible to show insanity. *State v. Graviotte*, 587.

DAMAGES.

1. If the verdict of the jury, in awarding damages against a street railroad company for the infliction of an injury through the gross negligence of a street car driver, is sustained by the testimony in the record, as well for the amount given as for the liability, the Supreme Court will not enter on an examination of the question whether vindictive damages have any place in the law of Louisiana, where the principal is made liable only for the neglect of his agent. But in such a case the verdict of the jury, being sustained by the evidence in the record, will be affirmed on appeal.

Howell v. St. Charles Street Railroad Company, 603.

2. The prescription of one year in bar of an action in damages for a quasi offense must be computed from the day on which the injury was caused, without computing the day on which it was received. C. C. 3430, 3467. *Chesnut v. Hughes*, 615.

3. This is an action by the owners of the schooner *Ladies' Delight* to recover damages from the owner of the steamer *Louise* for a collision which occurred between these vessels in Lake Pontchartrain. The evidence shows that the night was dark; that the steamer showed all the lights required by law; that had the schooner showed the lights required by law, the collision would have been avoided. Held—That the collision having occurred through the fault and negligence of the officers of the schooner, her owners could not recover damages. *Miller v. Morqan*, 625.

SEE APPEAL—*Baldwin v. Green*, 53.

SEE MORTGAGES—*Citizens' Bank v. Knapp*, 117

DEDICATION TO PUBLIC USE.

1. No deed or act of conveyance is necessary to dedicate land or rights in immovable property to the public. Nor is any particular form necessary to the dedication of land to the public use. All that is required is the assent of the owner of the land, and the fact that it is being used for the purposes intended. 18 An. 560; 21 An. 244. *City of Shreveport v. Walpole*, 526.
2. A third party, occupying lands that have been dedicated to the public use, is without the capacity to acquire title thereto, because such lands are, from the moment of the dedication, out of commerce and are not subject to individual or private ownership. 21 An. 244. *Ib.*

DEPOSIT AND DEPOSITARY.

1. In case of a deposit of a particular thing, such as gold coin, the depositary may be condemned in the alternative to return the thing deposited, or pay its value in money.

Beyris, Widow and Administratrix v. Spor, 16.

2. A party who, having taken charge of another's furniture and dwelling house in New Orleans, under an agreement with the owner, in the year 1862, shortly after the city was captured by the military forces of the United States, must be viewed as a depositary, and as such is responsible for the return of the goods when demanded by the owner. In a case like this, the depositary can not urge the disloyalty of the owner in bar of his right to recover. Nor does the law require that a citizen of the United States, who made a deposit of his goods and effects with another, shall, before bringing suit exhibit evidence of his loyalty.

King v. Cressap, 211.

3. The question of loyalty is one that an agent or depositary can not plead against his principal. *Ib.*
4. A suit for the recovery of goods on deposit, or their value, is in time if brought within one year from demand for restitution. *Ib.*
5. A depositary who seeks to avoid the payment of deposits made and notes collected, and the proceeds passed to the credit of the depositor, on the grounds that the deposits made, and the notes collected and the proceeds deposited were in an unlawful and worthless currency, commonly called Confederate notes, must establish the fact by evidence so conclusive that nothing is left to conjecture or inference. The doctrine in the case of *Weaver v. Anfoux, 20 An. page 1*, reaffirmed.

Greeves v. Louisiana State Bank, 228.

6. The evidence of witnesses who are unable to testify from personal knowledge to the character of the funds received on the notes collected by the bank and the deposits made, is not sufficient when not corroborated by the books of the bank, the checks drawn, etc., to establish with the legal certainty required, that the deposits made were in Confederate notes, and the depositary, under such proof, can not be relieved from responsibility to the depositor for the amount thus collected and deposited. *Ib.*
7. A bank that acted in the capacity of agent in the collection of notes, without instructions, can not be relieved from the payment of the amount collected in lawful money, by showing that Confederate notes were in general circulation at the time, and that the bank was in the habit of receiving and paying out such notes indifferently with other currency. To shield itself from responsibility under such circumstances, it must be shown affirmatively, that the depositor was fully aware of, and assented to, the receiving of Confederate notes in payment of his deposits, or that he

DEPOSIT AND DEPOSITARY—Continued.

acquiesced in, and fully ratified the receipt of such notes after they had been received by the bank in payment of notes placed there for collection. *Ib.*

DISTRICT COURTS.

1. If the district judge has not original jurisdiction, and it is not necessary to aid him in the exercise of his appellate jurisdiction, he can not issue the writ of prohibition against the parish judge, restraining him from proceeding further in the cause.

Bush v. Head, 459.

2. Article 83 of the constitution gives to the Legislature express and plenary power to create as many district courts in the parish of Orleans as the public interests may require. Under this general power, the Legislature has the undoubted power to control the organization and jurisdiction of the several district courts which it finds it necessary to establish. The latter clause in this article of the constitution, which creates seven district courts for the parish of Orleans, and defines the jurisdiction of each court, is provisional only, and to last till otherwise provided. Therefore, the act No. 2, approved March 16, 1870, which creates the Eighth District Court, and defines its jurisdiction, is not in conflict with this provision of the constitution, because it divests some of the other district courts, created by the constitution, of a portion of the jurisdiction granted to them by this article.

State, ex rel., The Pontchartrain Railroad Company, v. The Judge of the Seventh District, 565.

3. Section three of this act, creating the Eighth District Court for the parish of Orleans, gives to this court exclusive jurisdiction to entertain all injunction suits. Section four requires the judges of all the other district courts of the parish of Orleans to immediately transfer the records of all injunction suits pending in their courts, to the Eighth District Court, to be proceeded with according to law. The same section declares the judges thereof incompetent to do any other act in such cases, except to make said order of transfer. Therefore the judge of the Seventh District Court of the parish of Orleans is without jurisdiction, from and after the passage of the act creating the Eighth District Court, to try or determine any injunction suit, although the writ might have issued from his court, and the cause be still on the docket. *Ib.*
4. A writ of mandamus will not, therefore, issue from the Supreme Court, compelling the judge of the Seventh District Court of the parish of Orleans to try and determine an injunction suit which has been granted prior to the passage of the act No. 2, creating the Eighth District Court, and is still pending. In such a case the record should be transferred from the Seventh to the Eighth District Court. *Ib.*

SEE APPEAL—*State, ex rel. Belden, v. Mahan*, 449.

State, ex rel. Roman, v. Judge, 591.

• SEE EVIDENCE—*Lussee v. Hays*, 307.

DONATION.

1. The giving of a check for money is a manual gift, and is subject to no other formality than that of delivery.
Succession of DePouilly, 97.
2. A donation *inter vivos* of a promissory note must be passed before a notary public and two witnesses, under penalty of nullity. C. C. 1523. *Ib.*
3. A claim for stock with its increase founded on a donation or gift by the father to his daughter, can not be enforced, when the evidence shows that the property never passed into the possession of the donee, and that the donor had revoked the donation on the ground of disobedience of his daughter in contracting a marriage.
Johnson v. Stevens, 144.
4. A donation *inter vivos* is null if it has not been passed before a notary public and two witnesses. C. C. 1523.
Farrar v. Michoud, 358.
5. In an action to enforce payment of a donation, given in the form of a written document, as in this case, in the handwriting of the donee, not in the form required to give it validity as a donation *inter vivos*, and the donee, as a witness on the trial, is unable to show any consideration for the donation, or to explain how he came in possession of it, which was not until five years after the death of the donor. Held—That the donee could not recover on the instrument as a donation *inter vivos*, because the forms of law had not been observed in making or accepting it; that it was not good as an ordinary obligation or promise to pay money, because there was no consideration shown; that the donee, having testified in his own behalf, and not showing any consideration for the instrument, the conclusion followed that there was no valuable consideration. *Ib.*
6. An act of donation *inter vivos* has no effect against third parties if it has not been registered in the proper book of donations kept in the parish where the property is situated. C. C. 1541, 1542, 1543, 1544, 1545.
Bowie v. Davis, 398.
7. In this case an imperfect donation was made in favor of Mrs. Bowie, a married woman: imperfect, because of the reservations by the donor in the act. Afterwards, and before the donation took effect, the donor and his wife, and the donee and her husband, made a notarial act, which was duly recorded, interpreting and construing the act of donation, declaring its meaning to be a sale of the property, and not a donation. Before, however, this act construing the donation was passed, the property was sold at marshal's sale by the creditors of the donor, and the husband of the donee became the purchaser. The husband of the donee having purchased the property described in the act at marshal's sale, executed a mortgage thereon for \$70,000, and the wife (the

DONATION—Continued

donee) made a renunciation of her rights in the act. Held—That her joining her husband and the donor in an authentic act of interpretation of the meaning of the act of donation, which was placed of record, with her subsequent act of renunciation in the act of mortgage given by her husband, she was estopped and precluded from claiming the property under the donation, which had never been properly registered. *Ib.*

8. The evidence of a donation *inter vivos* of real estate must be in writing. But, in a suit by the wife against her husband for a separation of property, in which she claims the price of a tract of land which she acquired from her ancestor by donation *inter vivos*, parol testimony is admissible to show that the husband sold the land and received the proceeds thereof. Third parties, creditors of the husband, in a suit to annul the judgment of the wife against the husband, can not inquire into the validity of the donation. 3 An. 610. *Johnson v. Jordan*, 486.

ELECTION.

1. The act of October 18, 1863, relative to elections, etc., No. 164, has no application to elections held before its passage. Under the acts of 1855 and 1856, a party, wishing to contest the election, must give the opposite party notice within ten days after the close of the election. This notice would be in time if given within ten days after proclamation of the result. *Davis v. Maxwell*, 66.

ESTOPPELS.

1. Estoppels are not favored in law, for the object of the administration of justice is to discover and apply the truth; but there may be cases in which courts are bound to say to a litigant that he has, to his own advantage or to the injury of his adversary, asserted judicially what is false, and that, having done so, he must be forever forbidden to unfold for his own benefit the truth of the matter, *Abbot v. Wilbur*, 368.
2. This being an action to annul, for want of citation, a judgment of the Fifth District Court; and it appearing that, before its institution, the plaintiffs had defeated, in the Third District Court, a large claim of the defendant, by the objection that there was then pending in the Fifth District Court a suit against them for the same demand, by the same party (being the same suit in which the judgment sought to be annulled was rendered): Held—That this amounted to an assertion that they had been cited in the Fifth District Court, an assertion made to their own benefit and the injury of the opposite party, and they could not afterwards be heard to say, or permitted to prove, that this assertion was false. *Ib.*

ESTOPPELS—Continued.

3. It is not intended herein to decide that the estoppel can supply the want of citation; but merely that it prevents the plaintiffs in this case from showing that such a want exists. *Ib.*
4. The insufficiency of the evidence on which a judgment is rendered is not a ground of nullity, but is to be exposed by appeal. *Ib.*
5. A judgment ordering the sheriff and seizing creditor to return to the purchaser the price of the adjudication of property sold at sheriff's sale is equivalent to a judgment formally annulling the adjudication. Therefore, when such a judgment has been rendered, and not appealed from, the surety on the appeal bond is estopped from setting up on a rule to show cause why he should not pay the judgment, that the first adjudication is still in force, because it has not been legally annulled. *Johnson v. Gennison, 397.*

EVIDENCE.

1. In a suit to recover possession of furniture, evidence is not admissible on the part of the defendant to show a payment on the furniture to a third party at the instance of the plaintiff, under the plea of *dation en payment*; nor is evidence admissible to prove that the owner is indebted to third parties for the furniture, where the title is not put at issue by the answer. *Douglas v. Raab, 55.*
2. A party having laid the foundation for the introduction of secondary evidence, by showing the loss of the original documents sued upon, is not required to prove that the original note or documents had affixed to them the required internal revenue stamps, before evidence can be received of their contents. *Van Wickle v. Poydras, 70.*
3. In the absence of proof to the contrary, the Supreme Court will presume that the judge *a quo* required proof of the signature of letters before receiving them in evidence. *Parham & Blount v. Estates of V. E. & E. K. Ogle, 73.*
4. The testimony of one witness, corroborated by letters of the debtor, is sufficient to establish a claim above five hundred dollars. *Ib.*
5. Where the evidence shows that the acceptors of a draft were the factors of the drawer, and at the maturity of the acceptance the balance was in his favor, the holder must make demand and give notice, to enable him to recover of the drawer. *Louisiana State Bank v. Buhler, 83.*
6. To enable the holder of an accepted draft to recover from the drawer, on a subsequent promise to pay, he must show that the promise was made with a full knowledge of his discharge. 20 An. 43. *Ib.*
7. A party having shown the existence and loss of a letter written by the executor before prescription accrued, in which he acknowl-

EVIDENCE—Continued.

edged the debt, may prove its date and contents by parol testimony. In such a case, it is not the promise or acknowledgment of the deceased, but of the executor in writing, that is sought to be established by parol evidence.

Sevier v. Succession of Gordon, 85.

8. Where the evidence shows that the attorneys employed in the case have engaged the services of other attorneys as associate counsel, without the knowledge or consent of the client, an action will not lie against the client to compel the payment of the fees to such associate counsel.

Voorhies v. Harrison, 85.

9. A document having the requisite amount of United States internal revenue stamps thereon is admissible in evidence, although they are not canceled as required by the revenue laws. The failure to have the stamps properly canceled subjects the parties to the penalties prescribed by the United States for such neglect, but does not invalidate or render the instrument inadmissible in evidence.

D'Armond v. Dubose, 131.

10. Where the evidence of the plaintiff, as a witness, is negatived by that of the defendant, judgment will be given in accordance with the weight of testimony of other witnesses and the surrounding circumstances of the case.

Wiederecht v. Biegel, 179.

11. After prescription has accrued, parol evidence is inadmissible to establish an interruption. Acts of 1853, No. 208, section 4; 20 An. 293.

Birch v. Bates, 188.

12. Where a case involves only questions of fact and the testimony is conflicting, judgment will be given in favor of the party having the weight and preponderance of evidence, and in a case where the plaintiff has failed to establish his allegations of fact by evidence, judgment will be given for the defendant.

Bloom v. Schonekas, 261.

13. In this case the district judge gave, as reasons for dissolving the injunction, "that none of the witnesses presented by the plaintiff were entitled to credit and belief." Five witnesses testified that the ownership of the property seized was not in the judgment debtor, but was in the plaintiff in injunction. No countervailing evidence was offered, nor was any effort made to impeach or discredit the witnesses offered by the plaintiff. Held, by the Supreme Court, that the judge of the district court erred in substituting his own belief of the credibility of the witnesses offered for that of other and counter testimony.

Lussee v. Hays, Sheriff, and Richards, 307.

14. To exclude the testimony of a witness taken under commission, on the score of interest, which, by the act of March 13, 1867, he is only permitted to give in open court, the record must disclose his liability, and show what interest the witness has in the litigation.

Case v. Watson, 350.

EVIDENCE—Continued.

15. Extracts from an inventory or proces verbal, when duly certified by the proper authority, are admissible in evidence, and it is unnecessary to introduce all the mortuary proceedings of a succession to prove a fact or establish a date.

Henderson v. Maxwell, 357.

16. A letter written by a creditor to his commission merchant, in which he agrees to remit the interest on his account against the merchant, when offered in evidence by the latter, the creditor can not be heard as a witness to show that he intended something different from that which its terms express. In a case of this kind, the party writing the letter can not be allowed to contradict or vary its meaning by parol testimony. The rule is well established that a party can not vary or destroy his voluntary agreement by other than written evidence.

Selby v. Friedlander, 381.

17. Parol testimony is admissible to show the consideration of a promissory note.

Gillard v. Huval, 426.

18. Payments that have been made, after emancipation, on notes given for slaves and personal property before emancipation, will be imputed to that portion of the debt which is ascertained to be for the personal property, that being the most onerous, and in fact the only part of the debt that is exigible at all.

Ib.

19. This is an action to recover on an obligation under private signature, viz: a draft. The defendant, in his answer, did not acknowledge, expressly, his signature, but contended that it was a forgery. Held—That, under this averment in the answer, the inquiry must be limited to the genuineness of the signature.

Pinckard v. Hampton, 439.

20. The evidence of one witness "that he was present when the draft was given," and that of another "that he is very familiar with the signature of the defendant, and believes his signature to the draft sued upon to be genuine," corroborated by circumstantial evidence given by two other witnesses, is sufficient to establish the signature over the averment of the defendant that it is a forgery.

Ib.

21. A promissory note given by a married woman, with mortgage on her paraphernal property to secure it, executed under the authorization of the district judge, according to the act 1855, may be enforced against the wife, in the hands of a third holder, without showing that it inured to her advantage or benefit.

Miller v. Wisner, 457.

22. The holder of negotiable paper, indorsed in blank, is presumed to have acquired it *bona fide* before maturity, and the burden of showing the contrary falls on the party raising the question of ownership.

Ib.

EVIDENCE—Continued.

23. The fact that the party accepting an act of mortgage has no interest therein does not affect the validity of the mortgage.
21 An. 3. *Ib.*
24. Written documents, under private signature, are inadmissible in evidence until the signature is proved. *It*
25. Parol evidence is admissible to prove a written agreement by the holder of a promissory note, extending the time of payment. Such evidence is not intended to prove an interruption of prescription, and is not, therefore, excluded by the act of 1858, which prohibits the reception of parol evidence to establish an interruption of prescription as against an estate.
Turner v. Beall, 490.
26. In a case like this, where the verdict of the jury is found to be contrary to law and the evidence in the record, the cause will be remanded to be proceeded with according to law.
Blair v. Peyton, 493.
27. In this case suit was brought to recover the amount of a note alleged to be lost or mislaid. The evidence admitted on trial, without objection, shows that the holder had received from the maker an amount of Confederate bonds, and had delivered the note to the maker, who shortly afterwards died; and the holder never had possession of the note afterwards. Held—That, having accepted the Confederate bonds, and delivered the note to the maker, amounted to an extinguishment of the note. That the delivery of the note to the maker at the time the bonds were received, rendered it certain that the bonds were not given as collateral security.
Vance v. Cooper, 508.
28. To enable a party to recover on a lost instrument, he must show by direct testimony, or by circumstantial evidence, supported by his oath, such a state of facts as render the loss probable. The oath of the attorney can not be substituted for that of the party. But if the attorney know of the loss, from his own knowledge, he is competent to establish the fact. *Ib.*
29. The failure to advertise the loss of a note within a reasonable time will defeat the claimant in a suit to recover. *Ib.*
30. This is an action to annul a transfer of a judgment under the allegations of fraud and deceit practiced by the defendant. Held—That under these allegations parol evidence was admissible to show the fraudulent and simulated character of the transfer.
Nicholson and Husband v. Hendricks, 511.
31. Courts are not permitted to go behind an enrolled, duly authenticated and promulgated public statute to inquire into the motives which may have influenced the members of the General Assembly in enacting it. Therefore, evidence tending to establish bribery

EVIDENCE—Continued.

and corruption against the members of the General Assembly, which, is alleged, procured its passage, is not admissible.

State, ex rel. S. Belden, Attorney General, v. Fagan, 545.

32. The burden of showing a failure of consideration of a promissory note falls on the party who alleges it, and if the maker sets up this defense against the holder in a suit to enforce it, the failure to make good his defense, by evidence, on trial in the lower court, is sufficient to authorize the appellate court to give damages against him for a frivolous appeal. *Hawkins v. Wiel, 579.*
33. Evidence to establish that a document was executed under the erroneous belief that the claim was prescribed, is not admissible under the allegation that the paper is a nullity because of the mental incapacity of the maker. *Cleveland v. Comstock, 597.*

EXECUTORS AND ADMINISTRATORS.

1. Expenses incurred for materials furnished and labor performed, at the request of the executor, for the preservation of the property of the succession, are properly chargeable to the estate, and are not prescribed by one year. The furnisher of materials, and labor done in repairs to the property of a succession, does not come under the class who are subject to the prescription of one year, as designated by article 3499 of the Civil Code.
Succession of Nitch, 316.
2. An account founded on an agreement between the testatrix and her agent that she should pay board to the agent with whom she was living, is chargeable to the estate, and is not prescribed by one year. *Ib. !*
3. In a suit against the coadministrators and a part of the heirs, designating them by name, to enforce payment of promissory notes, and to annul certain donations made to the heirs named, in fraud of their rights as creditors, where it is shown that the widow of the maker of the note is still living, and the debts of the creditors are community debts, the case will be remanded, with instructions to make the widow and all the heirs parties.
Levi v. Corkern, 329.
4. An opposition to a tableau of an executor comes too late, if it is not filed, nor offered to be filed, until after the case has been tried and submitted, and taken under advisement by the judge. In such a case the opposition should not be filed.
Succession of Hardesty, 332.
5. Attorneys employed by the executor to attend to the litigations in which the estate is, or may be involved, are entitled to a fair and liberal compensation for their services.
Succession of Day, 366.
6. The executor of an estate is only entitled to charge two and one-half per cent. commissions on the property that actually comes

EXECUTORS AND ADMINISTRATORS—Continued.

into his possession to be administered upon. He is not entitled to commissions on all the property which falls into the possession of the legatee, unless it is shown that it first passed through his hands as executor. *Ib.*

7. The rule is well established that neither executors nor administrators have the power to create liabilities against the estates they represent to waive rights which belong to it, to change the nature of its obligations, or to increase its responsibilities in regard to its debts. But, when judgment has been confessed, as in this case, by the administratrix, on demands that are well founded: *Held*—That the heirs must show in opposition to a rule by the judgment creditors for a sale of the property, that the confession by the administratrix was made to their injury, and that their rights of defense against the claims were waived by the confession.

Succession of Decuir, 371.

8. If the administratrix had no funds in hand with which to pay the judgments against the estate, neither her nor the heirs can successfully oppose an application for a sale of the property of the succession to pay the judgment creditors, and a tableau by the administratrix, as a preliminary step, is unnecessary. *Ib.*

EXECUTORY PROCESS.

1. Service of executory process on the mortgaged debtor interrupts prescription, whether he makes defense or not.

Hebert v. Chastant, 152.

2. The change of executory proceedings to that of ordinary proceedings, by answer to the injunction taken out by the defendant against the order of seizure and sale, will operate a discharge of the sureties on the injunction bond, and the sureties, having no further interest in the litigation, need not be made parties to the appeal from the judgment dissolving the injunction.

Walker v. Ducros, 214.

3. A court of probates, as such, has no jurisdiction to issue an order of seizure and sale in executory proceedings for the collection of a mortgage note.

Graham v. Succession of Markey, 266.

4. Executory process can not be issued except upon authentic evidence that the debt is due. Where, therefore, it was issued to enforce a debt agreed to be paid at the majority of the plaintiff, and the petition alleged that the plaintiff was emancipated by marriage, and the debt, was, therefore, exigible; but there was no authentic evidence of the fact that she had become of age. *Held*—That the process was illegal and must be annulled.

Hoffman v. Steib, 267.

5. Where mortgage notes have been given to factors or commission merchants, to secure advances made and supplies furnished to a

EXECUTORY PROCESS—Continued.

planter, and an account is rendered and a balance struck showing the amount due by the planter, the factor can not resort to the executory process to enforce payment of the balance claimed to be due, even if a mortgage exists to secure the balance.

Ward v. Douglass, 463.

6. In such a case the factor should be compelled to establish the correctness of his account contradictorily with the planter. *Id.*

EXPRESS COMPANIES.

1. The Southern Express Company, by taking a package of gold to transport from New Orleans to Mobile with full knowledge of its character and contents, became liable for the amount which the package contained, that was lost or miscarried by the company, even though the receipt, given by the company at the time, showed that it was an ordinary package, valued at fifty dollars. The company on being made acquainted with the contents of the package by the agent for the owner, should have given a receipt for the full amount, and not attempted to limit their liability to fifty dollars. *Kember & George v. Southern Express Company*, 158.
2. The receipt, given by an express company for the shipment of a package, which contains the clause, that, in case of loss, the company will not be responsible for anything above the amount stated in the receipt to be its value, is not absolutely conclusive against the shipper, and he may show by evidence, in case of loss, that the package contained gold coin, and recover the amount notwithstanding the receipt. *Id.*

FRAUD.

1. A party seeking to avoid a contract on the ground of error must show that fraud, force or improper influences were perpetrated by the other contracting party. The allegation that he signed the written contract without reading it or knowing its contents, will not relieve him under the plea of error.

Watson v. Planters' Bank of Tennessee, 14.

2. Plaintiff, a merchant in the city of New Orleans, had for his customers the defendants, residing at DeKalb, Texas. Defendants became largely indebted to plaintiff. A brother of defendants, who had been their clerk, came to New Orleans with drafts in favor of the defendants, and some money, and purchased a lot of new goods. Immediately thereafter the plaintiff, being a creditor, attached the new goods thus purchased. On trial judgment was rendered in favor of the attaching creditor. The brother who had formerly been the clerk of the defendants, with no visible means or business to indicate capital, intervened in the attachment suit, and claimed that he had made the purchases of the goods attached on his own account; that he had bought the store

FRAUD—Continued.

in Texas and was doing business for himself. The evidence failed to show a sale before the attachment was made, and also failed to show any consideration therefor, or that the money with which the goods attached were purchased was his own. Held—That, under this state of facts, the sale of the store, in Texas, and the pretended ownership of the stock of goods bought in the city of New Orleans, amounted to a fraud on the part of the intervenor and defendants, and was, therefore, null and void.

James v. Johnson, 395.

SEE PRACTICE—*Nicholson v. Hendricks*, 511. *Bujac & Girard v. Williamson*, 538. *Merchants' Mutual Insurance Company v. Pointer*, 620.

GARNISHMENT.

1. As a general rule, the garnishee may be permitted by the district judge to amend his answers to interrogatories, after an order *pro confessis* has been made, and before judgment against the defendant. But the case would be different if the answers are manifestly evasive, and calculated to jeopardize the rights of the attaching creditor, or defeat the jurisdiction of the court over the defendant.

Tapp, Kennedy & Walsh v. Green & Brother—Campbell & Strong, Garnishees, 42.

2. Partnership assets pledged to a creditor of the partnership can not be seized by garnishment process for an individual debt of one of the partners.

The Ursuline Nuns v. Connolly—Mechanics' and Traders' Bank and Robinson, Garnishees, 51.

3. A judgment against a garnishee, predicated on answers to interrogatories, will not be disturbed on appeal, where no evidence was offered by the defendant on trial of the garnishment in the court below.

Citizens' Bank v. Bringier, 118.

4. The husband and wife were garnisheed under a writ of *fieri facias*. The defendant and judgment debtor intervened and contested the correctness of their answers to interrogatories. After the intervention was filed, the wife was allowed to amend and correct her answers so as to make them conform to the allegations of the defendant in his petition of intervention. The husband stood on his original answers, which, in substance, denied any indebtedness to the defendant. Held—That the wife, by amending and correcting her answers to the interrogatories, so as to make them conform to the allegations in the petition of intervention, she thereby rendered herself liable to the seizing creditor for the amount alleged to be due the defendant in his petition of intervention, and that judgment was properly rendered against her as garnishee; but, as

GARNISHMENT—Continued.

the husband stood on his original answers, no judgment could be rendered against him as garnishee.

Rochereau & Co. v. Bringier, 129.

5. A garnishee is only liable to the attaching creditor for the amount of his indebtedness or the amount of the assets in his hands belonging to the seized debtor.

Daigle v. Bird—Greves, Garnishee, 138.

6. Garnishees residing in the city of New Orleans can not be held liable to the attaching creditors for a lot of cotton in their hands, or the proceeds thereof, where the evidence shows that the cotton attached was purchased at sheriff's sale, in the State of Arkansas, before shipment, by one of the garnishees on their own account.

Cryer v. Drewry, 384.

7. A judgment against a garnishee, rendered on a rule to show cause why he should not be condemned, on his answers filed, to pay the amount of plaintiff's demand, is erroneous, if the answers do not admit an indebtedness, and the rule contains no averment under which proof could be introduced, and no proof was introduced traversing the answers. In such a case the judgment against the garnishee will be reversed on appeal.

Coe, Shenehan & Dewitt v. Rocha, Becker & Co.—Samuel, Garnishee, 590.

GOVERNOR.

1. The writ of mandamus will not lie to compel the chief executive officer of the State to perform any act coming within the range of his duties as Governor.

State, ex rel. Oliver et al., v. H. C. Warmoth, Governor.—The State intervening, 1.

2. Under the division of powers as laid down in the Federal and State constitutions, the judiciary department has no jurisdiction over, or right to interfere with, the independent action of the chief executive, in the exercise of the functions of his office, even though the act he is required to perform be purely ministerial in its character. The question whether an act coming within the range of the duties of the chief executive is ministerial or political can not be determined judicially. It must rest with and be determined by the chief executive himself. *Ib.*

3. The Legislature is competent to clothe the Governor with authority to remove an incumbent from office for failing or refusing to discharge his duties according to the requirements of the law by which the office was created.

Evans v. Populus, 121.

4. Where the Governor removes an officer under a special authority given by statute, courts will presume that he had proper cause for the exercise of that prerogative. This presumption may, however, be overthrown by countervailing proof. 19 An. 210. *Ib.*

GOVERNOR—Continued.

5. Article 66 of the constitution provides that the Governor shall return all bills which he does not approve, with his objections thereto, to the House in which they may have originated, in five days from the day of presentation, except where such return is prevented by an adjournment. In that case the Governor is required to return all such bills as he does not approve, on the first day of the next General Assembly. Held—That by this article of the constitution, the Governor has until the meeting of the next General Assembly to deliberate as to whether he will approve or disapprove any bill that has passed less than five days before adjournment, and in case he approves any bill thus situated, he may sign it any time before the meeting of the next General Assembly, and such act becomes a law from the moment he signifies his approval by affixing his signature thereto.

State, ex rel. Belden, Attorney General, v. Fagan, 545

6. The Governor is the proper representative of the State and bound to protect her interests. Therefore, in a case where the other officers, such as the Attorney General or other officers, are absent from the State or fail to discharge their duties in taking an appeal, the Governor is bound to intervene in behalf of the State and take the appeal. *State, ex rel. Mahan, v. Dubuclet, State Treasurer, 602.*

HUSBAND AND WIFE.

1. The wife of an insolvent, having specially renounced her mortgage rights in due and legal form, in an act of mortgage given by her husband before his insolvency, in favor of a creditor, must show, in order to defeat the rank of the mortgage over that of her own after insolvency, that her renunciation was obtained through improper influences of her husband. The fact that the husband was present at the time of signing the renunciation does not prove that he exercised improper influence in procuring her signature.

Oriol v. His Creditors, 32.

2. Where the wife separated in property from her husband, has instructed her factor to purchase a mortgage note having a superior rank to her claim, on the property of her husband, which note the factor transfers to a third party after maturity, she may intervene in the suit to enforce payment, and be declared the true and legal owner thereof.

Gribble v. Haynes, 141.

3. The signing of an appeal bond by the husband in a suit where the wife is plaintiff, and his joining her in an assignment of errors filed in the Supreme Court, is not a sufficient compliance with article 123 of the Civil Code. The authorization of the wife must be given either by the husband or the judge before the trial of the cause in the court *a qua*.

Tutorship of Stokes, 204.

HUSBAND AND WIFE—Continued.

4. An appeal taken from a judgment where the wife is plaintiff will be dismissed on motion, if it appears that she was not legally authorized to prosecute the suit in the court below. *Id.*
5. The wife, having purchased property with her own paraphernal funds, and administers it independently of her husband, is entitled to have a judicial mortgage resulting from a judgment against her husband set aside, by rule, in so far as it operates as an incumbrance on her separate paraphernal property.

Reilly v. Rodewald, 243.

6. In a suit for separation from bed and board by the wife against her husband, the jurisdiction of the court *a qua* is not lost over the case in matters not passed upon in the decree of separation, and the judge *a quo* may pronounce on the right of the wife to receive alimony pending the litigation, notwithstanding a suspensive appeal has been taken by the husband from the judgment of separation.

State, ex rel. Malady, v. Judge of Seventh District Court of New Orleans, 264.

7. The husband can not be made to pay counsel fees of the wife in a suit for separation from bed and board, even though she may be in necessitous circumstances, and entitled to alimony pending the proceedings for separation. *Id.*
8. The assignment by the husband of a judgment in his favor, to the wife in payment of her paraphernal claims against him, is a proper and legal transaction. And the fact that the amount of the judgment is far in excess of the amount of the wife's claim is not sufficient, if the evidence shows that the real value of the judgment is not above that of the claim of the wife, to raise the presumption of fraud in the transaction. All transactions allowed by law, calculated to protect the interests of married women, are regarded in a favorable light by the courts of this State.

Murrison v. Seiler, 327.

9. The renunciation by the wife, in a mortgage given by her husband, does not transfer to the mortgagee her rights of mortgage, but only transfers to him the rank to which her mortgage on the property of her husband was entitled at the time.

Gegan v. Bowman, 336.

10. The renunciation in an act of mortgage by the wife ceases to be evidence against her, if the mortgage is not reinscribed within ten years. Therefore, where a mortgage was given by the husband, with a renunciation of the wife, and afterwards a second mortgage was given without the renunciation of the wife, and the first mortgagee failed to have his mortgage reinscribed within ten years, the mortgage of the wife, being relieved from the effect of

HUSBAND AND WIFE—Continued.

- her renunciation, by the failure to reinscribe, will take rank over the second mortgage, and the first mortgage, having lost its rank by failure to reinscribe, the second will take rank over it. *Ib.*
11. The reinscription of a mortgage after the lapse of ten years, only entitles it to rank as a mortgage from the date of such reinscription. And, where the wife has renounced, her consent must be given to the reinscription, otherwise it will be inoperative as against her. *Ib.*
 12. The wife can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the community. C. C. 2412. *Summers v. Hollingsworth*, 386.
 13. The question of the effect of the renunciation of the wife's mortgage can not be examined by the appellate court, if, in answer to the appeal, she fails to ask for the amendment of the judgment in her favor. *Ib.*
 14. A judgment that has been regularly obtained by the wife against her husband can not be contested or inquired into collaterally by a creditor of the husband whose claim only arose after it was rendered. 10 An., 564. *Farrel v. O'Niel*, 619.
 15. The burden of proof falls on the creditor who alleges that a judgment in favor of the wife and against her husband is simulated. *Ib.*
- SEE ACCOUNT—*Gribble v. Haynes*, 143.
 SEE COMMUNITY—*Quirk v. Her Husband*, 575.
 SEE DONATION—*Johnson v. Jordan*, 486.

IMPUTATION.

1. Payments that have been made, after emancipation, on notes given for slaves and personal property before emancipation, will be imputed to that portion of the debt which is ascertained to be for the personal property; that being the most onerous, and in fact the only part of the debt that is exigible at all. *Gillard v. Huval*, 426.
2. Payments made before emancipation, on a debt contracted for the sale of a plantation and slaves, discharge the debt *pro tanto*. But that which is found to be due after emancipation can only be enforced for that portion which is not for slaves, in the proportion that each bears to the entire debt. *Sandidge v. Sanderson*, 21 An. 757. *Allen v. Tarlton*, 427.
3. Credits placed on promissory notes must, in computing the amount still due, be applied first to the extinguishment of the interest due at their respective dates. *Ib.*
4. The maker of a promissory note who enters into an agreement with the holder, whereby he obtains an extension of the time of payment, with a promise to pay interest, is precluded thereby,

IMPUTATION—Continued.

from setting up that the holder is not the owner thereof. Such agreement, it is true, does not change the real title to the paper, but it bars the maker from contesting the ownership with the holder. *Conrad v. Callery*, 428.

5. In a suit on an obligation given for a mixed consideration, part land and part slaves, that portion which is ascertained to be for slaves will be deducted from the entire amount of the contract, and judgment will be given for the balance. But in case payments have been made before emancipation, the amount will be credited ratably, that is, in the proportion that each bears to the entire contract. *Sandidge v. Sanderson*, 21 An. 757. *Ib.*

INJUNCTION.

1. The execution of a judgment can not be restrained by injunction, by a third party, who holds the property seized by a simulated title. *Dewey v. Bird*, 163.
2. An injunction will not be dismissed on account of insufficient security, if it appears that the party will be immediately entitled to the same remedy; but the judge *a quo*, may in his discretion permit additional security to be given.

Woolfolk et al. v. Woolfolk, 206.

3. An injunction will not be set aside for irregularities in the bond or affidavit, if it is manifest, from a mere inspection of the record, that the plaintiff would be immediately entitled to another injunction. *Henderson v. Maxwell*, 356.

4. The sale of a judgment will be staid by injunction, if the judgment debtor has been notified of the transfer before the seizure was made, provided the transfer was made *bona fide*.

Pottier v. Strickland, 393.

5. A party holding merchandise under a simulated sale, can not defeat the rights of a seizing creditor by the writ of injunction. In such a case, if the sale is shown to be simulated, the injunction will be dissolved, with damages, *in solido*, against the principal and surety on the injunction bond. *Mora v. Avery*, 417.

6. If the judgment of the court below, dissolving the injunction, is affirmed on appeal, it will be so amended, on prayer to that effect, as to embrace the surety on the bond, who will be condemned, *in solido* with the principal, in damages for enjoining the sale on a simulated title. *Ib.*

7. The rule is well settled that an injunction will not be dissolved for an alleged informality, if it appear from the record that there exists good cause for an injunction. *Ward v. Douglass*, 463.

8. In determining the question whether acts complained of will work an irreparable injury to the plaintiff, on the trial of a motion to dissolve an injunction on bond, all the allegations in the petition

INJUNCTION—Continued.

for injunction must be taken as true. And if the facts set up show a trespass on real property, which, if continued, would change the possession of immovable property, the motion to bond under art. 307 C. P. will be overruled, because an irreparable injury would be done the plaintiff.

Marion and Husband v. Johnson, 512.

9. The State has the right to restrain, by injunction, persons who have combined together for the avowed purpose of doing what is prohibited by law, and also to prevent such persons from interfering with her agents in the execution of the legislative will. And the Attorney General of the State is the proper officer to institute proceedings against such persons.

State, ex rel. Belden, Attorney General, v. Fagan, 545.

SEE APPEAL—*State v. Judge*, 262.

Avegno v. Johnson, 400.

INSOLVENCY.

1. The wife of an insolvent, having specially renounced her mortgage rights in due and legal form, in an act of mortgage given by her husband before his insolvency, in favor of a creditor, must show, in order to defeat the rank of the mortgage over that of her own after insolvency, that her renunciation was obtained through improper influences of her husband. The fact that the husband was present at the time of signing the renunciation does not prove that he exercised improper influence in procuring her signature.

Oriol v. His Creditors.—On Opposition to Tableau, 32.

2. A creditor of an insolvent can not urge the pendency of the insolvent proceedings as a suspension of prescription, and, at the same time, ignore the provisions of the insolvent laws as to the form of proceeding against his ceding debtor.

Akin v. Giraud, 577.

3. A judicial admission made in an insolvent proceeding whereby the claim of the creditor is allowed, is prescribed by ten years. *Ib.*

INTERROGATORIES.

1. An attorney at law having possession of assets of the seized debtor, is not excused from answering interrogatories by the seizing creditor, and if the answers are traversed by the attaching creditor, an appeal will lie from the judgment given on the testimony offered to show their incorrectness.

Daigle v. Bird, 138.

2. A garnishee is only liable to the attaching creditor for the amount of his indebtedness or the amount of the assets in his hands belonging to the seized debtor. *Ib.*

INTERVENTION.

1. Where judgment has been rendered against the intervenor in the lower court, and no appeal is taken therefrom, and the other parties do not make the intervenor a party to the appeal, the appellate court will not interfere with the judgment of the court below on the intervention. *Beckwith v. Pierce*, 67.
2. In all cases where an intervention is allowed, the intervenor is entitled to the delay necessary to cite the parties against whom it is directed. This rule applies whether the intervention has been filed before or after issue joined.
Taylor and Husband v. Boedecker & Badenhausen.—*Moody, Intervenor*, 79.
3. An intervenor having his remedy by direct action, is required to be always ready to plead or exhibit his testimony. *Ib.*
4. Plaintiff, a judgment creditor of the husband, caused his property to be seized under execution. The wife caused execution to issue on her judgment, and the same property was seized, a sale was made under these seizures, plaintiff took a rule on the sheriff to pay over the proceeds of the sale in satisfaction of his judgment. The wife intervened in this rule and claimed the proceeds, on the ground of a superior mortgage to that of the seizing creditor. Held—That she should be permitted to do so; that the court was without the capacity to decide on the proper disposition to be made of the proceeds unless all the parties interested were before it; that to allow the wife to intervene and establish her right to the proceeds of the sale in this proceeding would avoid a circuity of action and put an end to the litigation.
Cobb v. Depue, 244.
5. Where the evidence shows that a purchaser of real estate has at the time, and before the purchase, full knowledge of a suit brought by the United States for a large portion of the land purchased, he can not set up in defense to the payment of the price that he is in danger of eviction by such suit, and obtain immunity from the enforcement of the contract, until the suit is decided. The knowledge of the existence of such a suit before the purchase forms an exception to the rule laid down in article 2535 of the Civil Code.
Merritt v. Merle, 257.
6. An intervenor, who has purchased the land from the vendee and claims to defend the title of his vendor, can not urge the existence of such a suit against the demand of the original vendor for the payment of the price. *Ib.*
7. Where the Board of Metropolitan Police has taken an appeal from a judgment rendered in an action commenced by their treasurer, a motion by the latter to dismiss the appeal will not be listened to.
State, ex rel. Burbank, Treasurer Metropolitan Police Board, v. Dubuclet, State Treasurer, 365.

INTERVENTION—Continued.

8. In an action thus commenced by the treasurer, the board has a right to intervene for the purpose of showing that the action was commenced without its approval, or in contravention of its orders. *Ib.*
9. The intervenor is not entitled to appeal from a judgment against the defendant, if no judgment has been rendered by the court below on the intervention. *Aleix v. Derbigny, 385.*
10. Where the plaintiff claims to be the owner of a promissory note and sues for possession, and the intervenor, who claims to be the owner of the same note, alleges that the transfer of the note to plaintiff is fraudulent and simulated, the revocatory action by the intervenor is not necessary to enable him to show the simulated transfer to the plaintiff. *Brown v. Brown, 475.*
11. If the intervenor alleges ownership of the note in controversy, the additional allegation that the claim of ownership of the plaintiff is fraudulent and simulated, is not inconsistent therewith; such an allegation only raises the question of ownership between the plaintiff and intervenor *Ib.*

SEE ACTION—*Cleveland v. Comstock, 597.*

INSURANCE.

1. A resolution of the Board of Underwriters of the city of New Orleans, authorizing a reward to be paid by the insurance companies for the apprehension, with sufficient evidence to convict any person guilty of the crime of arson, can not be explained or interpreted by parol testimony, nor is the testimony of the president of the Board of Underwriters admissible for that purpose. *Salvadore v. Crescent Mutual Insurance Company, 332.*
2. The several fire insurance companies of the city, by resolution of the Board of Underwriters, instructed John Youenes, fire warden, to make a searching investigation into the cause and origin of all fires which occur in buildings, stocks of merchandise, or on board of any vessels, while lying in this port, insured by any insurance company in the city of New Orleans, and to offer a reward of five thousand dollars for the conviction of any person or persons found guilty of participation in any such fire. *Ib.*
3. John Youenes, in conformity to this authority, offered a reward of five thousand dollars, to be paid to any person or persons who will procure such testimony as will convict, in the criminal court of this State, any person who may be guilty of the crime of incendiarism. Two criminals, Rose and Abrahams, were imprisoned for the crime of arson before the publication of this reward was made. After it was made, and before the trial in the criminal court, the plaintiff in this suit procured such testimony as led to their conviction. He now seeks to enforce payment of the reward. The insurance companies resist the demand, on the ground that

INSURANCE—Continued.

the reward was only intended to cover, and did only cover, such crimes as might be committed after its publication, and did not apply to crimes that had been committed before the reward was made. Held—That, by a fair interpretation of the meaning of the language used in the resolution and the notice given by Yonenes, the reward was demandable on producing the necessary evidence to convict, whether the crime had been committed before or after the publication; that the terms of the obligation clearly show the object of the company to be to aid in the punishment of crime, and the protection of themselves and the public against criminals of this character, and not merely as a warning to deter parties from committing incendiary crimes. *Ib.*

4. A judgment that has been rendered against a life insurance company in favor of one claimant of the policy, can not be invoked by the company as *res judicata* in a suit brought by another claimant, who was not a party to the suit in which it was rendered. It may, however, be set up in defense to the second action, and the company be permitted to show that they paid to the party legally entitled to the money.

Wood v. Phoenix Mutual Life Insurance Company, 617.

5. The possession of a printed or written policy of insurance is not conclusive proof of a right to recover the insurance money. It is merely the evidence of the contract. The right to the money may be assigned without any reference to the policy. *Ib.*

JUDGMENT—NULLITY.

1. A judgment of the probate court, declaring a seizure of succession property null, on the ground that nothing tangible had been seized, is conclusive against the seizing creditor, and the probate court is competent to pass on the merits of an opposition to a tableau filed by the seizing creditor, notwithstanding an appeal is pending from the judgment declaring the seizure null.

Succession of Millaudon—Opposition of Schumert to Executor's Account, 12

2. A decree of the court rendered on a rule to compel the sheriff to credit a writ of seizure with a balance in his hands is a final judgment, and no appeal lies until it is signed by the judge.

Leeds v. Louisiana Manufacturing Company, 16.

3. An injunction granted on the allegation of nullity of the judgment on which execution issued, will be dissolved, with damages, if the action of nullity is barred by prescription.

Weber v. Frost, 348.

4. The dismissal of the appeal on the ground that the judgment of the lower court was not signed by the judge will not interrupt the prescription of the action of nullity. *Ib.*

JUDGMENT—NULLITY—Continued.

5. The constitutional provision requiring all process to issue in the name of the State of Louisiana is sufficiently complied with, if the citation is headed "State of Louisiana." *Ib.*

JURIES AND JURORS.

1. On questions of fact, the verdict of the jury is entitled to weight, and will not be disturbed on appeal, unless it is manifestly erroneous. *Fisher v. Hyland*, 31.
2. The answer of a juror on his *voir dire* to questions propounded by the accused, that from what he has read in the public prints he has formed an unfavorable opinion of the character of the accused, but that he has formed no opinion as to his guilt or innocence of the crime charged, does not disqualify him from sitting on the jury. *State v. Schnapper and Malone*, 43.
3. Section sixteen of the acts of 1855 limits the district judge, when presiding over criminal trials, to giving to the jury a knowledge of the law of the case; but in doing this the judge may make such observations as tend only to aid the jury in their inquiries, abstaining from all comments on the testimony calculated to influence their minds in deciding upon the facts. *It*
4. The capacity of a sheriff, duly commissioned and acting as such, can not be tested or inquired into collaterally on a motion to quash a venire of jurors. 21 An. 543. *State v. Ferray*, 423.
5. In this case the petit jury was regularly drawn, and a list thereof was served on the accused three days before the trial. On the day of the trial, when the jurors were called, it appeared that six or seven of the number had not been found by the sheriff, after diligent search, and that those who failed to answer to their names had been legally excused for good and valid cause shown. Held—That a sufficient number, from among the bystanders, to fill out the panel, were properly summoned as talesmen. *Ib.*
6. The statute of 1868, relative to juries in all the parishes of the State, except that of the parish of Orleans, repealed all former statutes on that subject, whether of a general or local character. Acts of 1868, No. 110, page 143. *Ib.*
7. If the verdict of the jury, in awarding damages against a street railroad company for the infliction of an injury through the gross negligence of a street car driver, is sustained by the testimony in the record, as well for the amount given as for the liability, the Supreme Court will not enter on an examination of the question whether vindictive damages have any place in the law of Louisiana, where the principal is made liable only for the neglect of his agent. But in such a case the verdict of the jury, being sustained by the evidence in the record, will be affirmed on appeal.

Howell v. St. Charles Street Railroad Company, 603.

JURISDICTION APPELLATE.

1. The jurisdiction of the Supreme Court in criminal cases is limited to questions of law, and questions of fact as to the regularity of the drawing of the jury will not be examined on appeal.
State v. Bruington, 9.
2. The amount due at the time of the institution of the suit constitutes the matter in dispute, and if the interest which is due at the time suit is brought, when added to the principal, is not above five hundred dollars, the Supreme Court is without jurisdiction.
Wolf v. Witherell & Co., 25.
3. The jurisdiction of the appellate court attaches as soon as the bond is filed, and citation of appeal is issued.
State, ex rel. Mount, v. Judge of Sixth District Court of New Orleans, 37.
4. The jurisdiction of the district court ceases at the moment the appellate jurisdiction attaches, and any order made or proceeding had by the district judge, after his jurisdiction has ceased, is null
Ib.
5. From the moment the appellate jurisdiction attaches, a writ of prohibition will issue restraining the district judge from further proceeding in the cause pending the appeal,
Ib.
6. From a judgment of the district court suspending the sheriff from office under the act of 1868, No. 123, the party suspended must show by evidence to entitle him to a suspensive appeal that the amount involved is above five hundred dollars.
State, ex rel. Schwab, v. Judge Second Judicial District, 49.
7. In order to obtain the writ of mandamus to compel the district judge to grant a suspensive appeal from a judgment suspending him from office, the relator must show that he has made the requisite proof of the amount involved before the judge *a quo* to give the appellate court jurisdiction. *Diamond v. Cain, 20 An. 575.*
Ib.
8. An affidavit or other proof made in the Supreme Court on the application for a mandamus, will not authorize the issuing of the writ
Ib.
9. The value of the books, papers, fixtures and furniture of the sheriff's office can not be estimated in determining the interest necessary to give the Supreme Court jurisdiction of the appeal from a judgment suspending him from office.
Ib.
10. A written document on which a suit is based must govern, where there is a variance between it and its description, but the court will not award more than is claimed in the petition.
Citizens' Bank v. Condran, 53.
11. In a case where the note draws eight per cent. interest, and the petition only claims six, the Supreme Court will not compute the interest at eight per cent., so as to give it jurisdiction of the appeal.
Ib.

JURISDICTION APPELLATE—Continued.

12. Where the interest due at the institution of the suit, when added to the principal demand, exceeds five hundred dollars, the Supreme Court has jurisdiction of the appeal.
Jaquet v. Levert & Co., 111.
13. The Supreme Court has no jurisdiction of a possessory action in which (the ownership of the property not being in dispute) the value of the possession is neither alleged nor proved to exceed five hundred dollars.
Slawson v. Meggett, 272.
14. If the plaintiff's demand is less than five hundred dollars, but the reconventional demand of the defendant is above that amount, the Supreme Court will only notice the appeal in so far as it affects the reconventional demand.
Pesant v. Heartt, 292.
15. A statement of facts on which the case was tried in the court below, showing a less amount than five hundred dollars to be due, will not divest the appellate court of jurisdiction, if the pleadings on which the action is founded show an amount above five hundred dollars to be in dispute.
Connors v. Avery, 331.
16. The mere filing of a motion or petition for appeal, with an appeal bond, does not divest the court below of jurisdiction over the case. To invest the appellate court with jurisdiction over the case, an order of appeal must be granted by the lower court.
McKnight v. Denourion, 373.
17. If the record shows that the amount in dispute in the court below is less than five hundred dollars, the Supreme Court will notice the fact *ex officio* and dismiss the appeal. 21 An. 728.

Zacharie v. Lyons, 618.

LAND TITLES.

1. An agreement, in writing, acknowledging the ownership in lands does not dispense with the production of the primordial title in a suit to recover. On the question of land titles in this State, the settled doctrine appears to be that where an agreement in writing acknowledges ownership in lands, if the title of such ownership is set forth in the instrument, and the existence and loss of the primordial title is shown, then the claimant is entitled to recover on producing the acknowledgment. But if the instrument or acknowledgment does not contain the original primordial title, the claimant under it can not recover without producing the primordial title referred to in the act referring to it.
Kiltridge v. Cane, 319.
2. Two parties, Brooks and Norris, owned tracts of land adjoining, both included in the Caddo cession to the United States. Norris sold his tract to Hall. Brooks brought suit against Hall for a settlement of boundary. A plat of survey was made under an order of court rendered on the consent of parties, describing the metes and bounds of Hall's tract of land, and describing and

LAND TITLES—Continued.

marking other tracts contiguous thereto, and included in the same grant. Daniels afterwards purchased sixty-one acres of land from Brooks, included in the same grant, and brings this suit against Hall for the same, who, he alleges, claims it as owner. The plat of survey, and the evidence in the record, shows that this sixty-one acres lies outside of the six hundred and forty acres purchased by Hall from Norris. Held—That the order of survey, rendered on consent of the parties, although not made in strict accordance with law, must be taken as a finality, and therefore the plaintiff must recover the land sued for, with rents and revenues.

Daniels v. Hall, 532.

LAND AND SLAVES.

1. The holder of promissory notes executed for the purchase price of a plantation and slaves before emancipation, can only recover that portion which is ascertained to be for the value of the land at the time of the sale. In case the purchaser has paid a portion of the price, the holder can recover that portion of the balance due which is ascertained to be for the land in the proportion of the value of the land and slaves in the original contract. The doctrine in the case of *Sandidge v. Sanderson*, 21 An. 757, reaffirmed. *Hebert v. Chastant*, 152.
2. A purchaser of land, slaves and movables may avoid that portion of the contract for which, slaves formed the consideration, by showing the relative value of the land, slaves and movables at the time of the sale. *Brou v. Beemel*, 189.
3. In determining the relative value of the land, slaves and movables at the date of the sale, the estimate placed upon them by the assessors, for the year previous to and the year following the sale, should be taken as a basis, rather than the estimate of witnesses made ten years thereafter. *Id.*
4. The rule is now settled that where the consideration of the note is part land and movables and part slaves, the holder can only recover that portion which is ascertained to be due on the land and movables after crediting the payments which have been made prior to emancipation, in the proportion that each bears to the entire contract. *Sandidge v. Sanderson*, 21 An. 757. *Walker v. Ducros*, 214.
5. Obligations given for the purchase of land and slaves can only be enforced against the land in proportion to the value of each at the date of the purchase; and where judgment has been rendered in the court below for the whole amount, the cause will be remanded for the purpose of ascertaining, by evidence, the value of each at the time. *Merritt v. Merle*, 257.
6. Payments made before emancipation, on a debt contracted for the sale of a plantation and slaves, discharge the debt *pro tanto*.

LAND AND SLAVES—Continued.

But that which is found to be due after emancipation can only be enforced for that portion which is not for slaves, in the proportion that each bears to the entire debt. *Sandidge v. Sanderson*, 21 An. 757. *Allen v. Tarlton*, 427.

7. The holder of a note given for land and slaves can only recover that portion which is ascertained to be for the land predicated on the entire price of the sale. *Sandidge v. Sanderson*, and *Satterfield v. Spurlock*, 21 An. 757, 771. *Castille v. Offutt*, 430.
8. An obligation given for a part of the purchase price of land is not invalid because the value of Confederate notes was taken as the standard by which the value of the land was measured.

Spyker v. Hart, 534.

LAWS, AND REPEAL OF

1. The act of the Legislature approved February 17, 1866, confirming the appointment of a Board of Levee Commissioners which had been previously made by the Governor, and authorizing the appointment of others, when their terms of office expired, repealed all former laws authorizing the parochial authorities to construct levees at the cost and expense of the front and riparian proprietors of the lands leveed.

Police Jury, Parish of Jefferson, Right Bank, v. *Tardos*, 58.

2. After the passage of the act of seventeenth of February, 1866, the parish can not force the front proprietor to pay the cost of the levee which she has ordered to be constructed along his front line.

Ib.

3. The repeal of a repealing clause does not revive the act repealed.

Ib.

4. The decisions of this court being matters of record and publication, it will be presumed that the Legislature had them in view in using a repealing clause of a peculiar character which had been, by those decisions, repeatedly interpreted; and, even if the correctness of the interpretation be doubted, the interests of society in a case where the release of a convict is claimed in virtue of an alleged repeal of a criminal statute, demand an obedience to the rule, *stare decisis*.

State v. Brewer, 273.

5. If a criminal statute be repealed, the prisoner who is being prosecuted under it must be discharged, even after judgment in the inferior court; but this rule is founded on the presumption of a legislative pardon, and does not exist where there is no room for such presumption.

Ib.

6. As the revisory legislation of 1870 contained a repealing clause identical in effect with that of 1855, and as the latter was repeatedly decided not to have repealed the provisions contained in the statute itself, but, on the contrary, to have continued them in force, it follows, on precedent, that the former did not repeal a

LAWS, AND REPEAL OF—Continued.

pre-existing statute relative to the crime of manslaughter, but on the contrary, continued it in force. *Ib.*

7. If the language used in an act of the General Assembly is clear and free from ambiguity, courts will not give it a different interpretation from that which the words used clearly import.

Denton v. Reading, 607.

LEASE.

1. The goods of a sub-lessee on the leased premises are only liable to seizure for the rent that is past due. A lessor can not hold the sub-lessee for rent that is not yet due, unless he show an *assumpsit* of the lease.

Sanarens v. True, 181.

2. A, the lessor of a house and premises, made an agreement *vente a remere* with B, the lessee, for his household goods and effects. A afterwards collected the rent due from the lessee, and gave a receipt therefor. Held—That A, the lessor, by giving the receipt and receiving the rent acknowledged the simulated character of the sale, and when demand of restitution of the goods and furniture was made by the owner, the lessor was precluded by such acknowledgment from urging the *vente a remere* in bar of the right to recover.

King v. Cressap, 211.

3. A lessee, receiving the premises in good order, is authorized to make the necessary repairs to keep them in that condition, and deduct the cost from the rent, and his omission so to do will not authorize a claim for damages, so long as the rent due is sufficient to defray the expenses of making the repairs.

Pecant v. Hartt, 292.

4. A suit to eject a tenant and recover possession of the leased premises is a summary proceeding, and a jury trial is not allowed in such a case, unless by express provisions.

Ib.

5. In a case where the United States military authorities took possession of leased property in the city of New Orleans, during the late war, it was held that the lessee was, from that date, absolved from all obligations to the lessor, on account of the lease; that, in a suit to enforce payment of the rent for the unexpired lease, by the lessor, if the lessee showed a termination of the lease by the military authorities, he was discharged; that, in a case of this kind, the lessor could not invoke the maxim, *contra non valentem*, etc., to defeat the plea of prescription, even if this maxim could be applied in any case.

Zacharie v. Sproule, 325.

6. In a case where the law has fixed the duration of a lease, in the absence of an express agreement, evidence of usage or custom is not admissible.

Jackson & Anderson v. Bekiny, 377.

7. In a suit on a contract of lease evidence of a custom is irrelevant, and should not be admitted. To enable a party to recover on a verbal lease, the evidence must make his demand certain; to make it probable is not sufficient.

Ib.

LEGAL TENDER.

1. The Supreme Court of the United States is the proper tribunal to decide finally upon the validity and effect of the acts of Congress, and the State courts should follow its decisions. Therefore, it having been decided by that tribunal that the legal tender act of February, 1862, does not apply to contracts made before its passage, the courts of Louisiana will render judgment thereon in gold.
Fickling v. Marshall, 504.

LEGISLATURE.

1. In all matters of a purely legislative character, the Legislature is supreme in all respects, except when restricted by the Constitution of the State, or the United States. As a legislative body, they form and constitute an independent, co-ordinate branch of the Government, and are in nowise under the control or supervision of the judiciary department.

State, ex rel. Belden, Attorney General, v. Fagan, 546.

- 2 Objections that the charter parties, in a charter granted by the State, have not completed the works within the time specified in the law, can only be urged by the State, in a suit by the State to have the charter forfeited. They can not be urged by third parties in a suit brought by the State to restrain them from interfering with her agents in the enforcement of the law. *Ib.*
3. The designating of the place or places where the slaughtering of animals shall be done, and prohibiting their slaughter at other places, falls within the police powers of the State. Whatever the State can lawfully do itself, it can do through the agency of a corporation. Therefore, the State, through the action of her Legislature, can make whatever police regulations may be necessary to preserve the public health, and can create, by the same authority, a corporation through which the police regulation prescribed by her may be enforced. *Ib.*
4. The act of the Legislature of 1869, No. 118, entitled "An Act to create the Crescent City Live Stock and Slaughterhouse Company," while it gives to said company the exclusive right to keep a slaughterhouse, and also the exclusive control and supervision over the inspection of all animals slaughtered for market in the city of New Orleans, yet it does not prohibit or exclude any person from the business of purchasing or butchering live stock, and selling the meat in the markets of the city. It only requires persons engaged in the business of slaughtering, etc., to comply with the police regulations prescribed by the law. Therefore, this act is not a violation of Article I., Section 2 of the bill of rights in the State Constitution, which provides that all persons shall enjoy the same civil, political and public rights and privileges. Nor is it in violation of the fourteenth amendment to the Constitution of the United States. *Ib.*

LEGISLATURE—Continued.

5. The designation, in the act of 1869, No. 118, of the places or wharves at which all live stock shall be landed from steamboats, is not a regulation of commerce between the States, and is not, therefore, a violation of the laws or Constitution of the United States. This provision of the law comes strictly within the police powers of the State, and is therefore legal. *Ib.*

SEE GOVERNOR—*Evans v. Populus*, 121.

LICENSE.

1. Section three of the revenue act of 1869, authorizing the levying and collecting a fixed amount as a license, makes no provision for a *pro rata* license, and a person commencing business in the latter part of the year must pay the full amount of the license authorized to be assessed. *Arbour v. Beauregard*, 238.
2. The requiring of every party owing a license to the State to pay the full amount, without reference to the time that he commences business, is not a violation of the principle of uniformity established by the constitution. *Ib.*
3. A firm engaged in the manufactory of agricultural implements in this State is liable to pay a license tax, the same as any other manufacturing firm, under the revenue laws of 1869, section 2. *Ib.*

LIQUIDATION.

1. A judgment ordering the liquidator of the Clinton and Port Hudson Railroad Company, an insolvent corporation, to collect, forthwith, sufficient funds to pay the creditors and bondholders of the corporation, is not a moneyed judgment, and is not prescribed by the lapse of ten years without reinscription or revival.
Liquidator of Clinton Railroad Company v. Lee, 287.
2. A compromise entered into between the liquidator of the Clinton and Port Hudson Railroad Company and the State, a creditor and bondholder, under the authority of an act of the Legislature, whereby the State agreed to take ten cents on the dollar, is not binding on the other creditors and bondholders of the corporation, and the liquidator can not set up in bar to the right of other creditors to recover, that he has entered into a compromise with the State at ten cents on the dollar. *Ib.*
3. The fact that the State has seen proper to compromise her claim against the company, with the stockholders, at ten cents on the dollar, furnishes no reason why the other creditors should be barred from collecting the whole amount of their claims. *Ib.*

SEE BILLS AND NOTES—*Wynn v. Kelly*, 594.

LITIGIOUS RIGHT.

1. To enable a defendant to avail himself of the benefit of a transfer of a litigious right by paying to the transferee only the amount which he paid for the claim, with interest, he must accept the validity of the claim. He can not contest the claim, and, after being defeated, urge against the transferee the litigious character of his title. *Salvadore v. Crescent Mutual Insurance Company*, 338.

MANDAMUS.

1. The writ of mandamus will not lie to compel the chief executive officer of the State to perform any act coming within the range of his duties as Governor.

State, ex rel. Oliver et al., v. H. C. Warmoth, Governor, et al.—

The State intervening, 1.

2. The city of New Orleans has a direct pecuniary interest in the funds in the custody and under the control of her treasurer; and a mandamus may issue from the Supreme Court to compel the district judge to grant a suspensive appeal from a judgment against the treasurer in all cases where the amount involved is sufficient to give the appellate court jurisdiction.

State, ex rel. Mount, Treasurer, v. Judge of Sixth District Court, parish of Orleans, 119.

3. A mandamus will issue from the Supreme Court to compel the district judge to grant a suspensive appeal from a judgment against the treasurer of the city of New Orleans where the record shows that the city is the real party in interest. A writ of prohibition will also issue staying all proceedings in the lower court pending the decision on the application of the city for a suspensive appeal. *State, ex rel. City of New Orleans, v. Judge Sixth District Court, parish of Orleans, 120.*

4. One creditor can not gain a preference over another by applying for a writ of mandamus to compel an officer to pay a sum of money out of funds to be thereafter received by him.

State, ex rel. Howard, v. S. N. Burbank, 298.

5. If the record shows, as in this case, that the treasurer of the Metropolitan Police was willing to do what was demanded of him, the writ of mandamus was unnecessary and should not have been granted. The province of courts of justice is to decide on real issues, and not to be used as instruments to work injustice. *Ib.*

6. A mandamus can not issue to a public officer or a public body to compel the performance of any act where they have a discretionary power. Nor will the writ issue to compel the treasurer of a corporation to pay a demand when there is no money in the treasury.

State, ex rel. Willox, v. Burbank, 318.

7. A writ of mandamus can not issue against the same body to compel the performance of two separate and distinct acts, the one not depending upon or growing out of the other. In such a case separate and independent writs must issue. *Ib.*

8. The Board of Metropolitan Police can not be compelled, by mandamus, issued at the request of a creditor, to receive an amount of funds alleged to be in the hands of the State Treasurer to their credit, because they, (the board), have the discretionary power to receive or refuse to receive the funds. *Ib.*



MANDAMUS—Continued.

9. A writ of mandamus should never be issued on the mere consent of the parties. Consent in such cases creates the presumption of fraud, and, when unsupported by evidence, can not form the basis of a valid judgment.

State, ex rel. Hughes, v. Burbank, Treasurer, 379.

10. The writ of mandamus will not lie to compel the police jury of a parish to make a contract or pass an ordinance authorizing the construction or shelling of a public road which, by the terms of the act authorizing it, they have a discretion to do or not to do.

State, ex rel. Bonnabel, v. Police Jury of Jefferson, left bank, 611.

SEE APPEAL—*State, ex rel. Lobdell, v. Judge, 90.*

State, ex rel. Commagere, v. Judge, 116.

MARRIAGE CONTRACT.

1. The marriage contract between A and B shows that B, the intended wife, brought in marriage five thousand dollars, which A, the husband, received before the marriage. After the marriage A invested the amount in real estate in the name, and for the benefit, of the wife. The wife afterwards sold the property to D, a third party. After this she brought suit against the purchaser to annul the sale and recover back the property, on the ground that the sale was made to settle an old debt, which, it was alleged, her husband owed the purchaser before the marriage. Interrogatories were propounded by her in this suit to the purchaser, in answer to which he stated that the husband had admitted to him that at the time he received the money before the marriage, from the uncle of his intended wife, he was acting as the clerk of the purchaser, and that he did not pay the same by investment in the property which he had purchased from her. It was held by the court, that these answers of the purchaser to the interrogatories, if admissible in evidence against the wife, only raise a presumption or suspicion of bad faith on the part of the intended husband. It was further held that this state of facts brought the wife within the rule, that she must show, *dehors*, the act of purchase that the property claimed by her and acquired during the existence of the community was purchased with her separate funds.

Block v. Melville, 147.

2. The recital in the contract of marriage that the wife brings into the marriage five thousand dollars, which sum is paid over to the intended husband in the presence of the notary and witnesses, is *prima facie* proof of the paraphernal character of the fund, and the burden falls on the purchaser of property from her, claimed to be bought with such funds that the property was actually bought with the funds furnished by the husband, and that said funds were furnished by the husband to the injury of the purchaser.

Id.

MARRIAGE CONTRACT—Continued.

3. Where two parties, the one residing in Louisiana and the other in Mississippi, enter into an antenuptial contract of marriage in the State of Mississippi, and immediately after marriage remove to and establish their domicile in Louisiana, the capacity of the parties, as well as the forms of the contract, must be tested by the laws of Mississippi, where it was made, while its effect must be governed by the laws of Louisiana, where it is to be enforced.
Succession of Wilder, 219.
4. A marriage contract made in Mississippi, by a minor on the one part, is not absolutely void, but is voidable only, unless the contract shows on its face that it is not to the advantage of the minor.
Ib.
5. Where the marriage contract confers upon the minor privileges and rights over her separate property, that she could not exercise under the law of the place where it is made, without the contract, it can not be said not to be to her advantage.
Ib.
6. In determining the question whether the contract was for the advantage of the minor, and whether it is void or voidable, the *lex loci contractus* must alone be consulted.
Ib.
7. A minor who has made a marriage contract, whereby the community of acquets and gains are stipulated not to exist during coverture, may bring suit to avoid such contract, on the ground of her minority at the time it was made, at any time within five years after her majority. If suit is not brought within five years after majority, the action is prescribed. C. C. 3507.
Ib.
8. It seems that, in a suit for a partition by one heir against the widow and the other heirs, where the plaintiff relied on a marriage contract executed in another State as a bar to the widow's right to one-half of the community, and the widow contests the validity of the marriage contract, the plaintiff may successfully plead the prescription of five years in bar of the widow's right.
Ib.

MORTGAGES.

1. A mortgage debtor is competent to renounce the benefit of appraisal. This renunciation can be made as well in a twelve months' bond as in an act of mortgage.
Stockett v. Johnson, 89.
2. An engine and machinery in and attached to a sugar house forms a part of the realty, and is subject to mortgage, but when detached, or removed from the sugar house, it becomes movable property, and is not subject to mortgage.
Citizens' Bank v. Knapp, 117.
3. In a suit to recover damages for the removal of an engine and machinery, by the mortgagor from a sugar house, the mortgagee must, in addition to showing bad faith, allege and show the actual injury done.
Ib.

MORTGAGES—Continued.

4. Where a third party has purchased real estate, which is subject to a special mortgage without the stipulation therein, of the pact *de non alienando*, the holder of the mortgage can only enforce it against the third purchaser by the hypothecary action; the case would be different in a simulation.

Waddill v. Payne & Harrison, 134.

5. Where three lots of ground lying contiguous to each other in the city of New Orleans, designated as lots Nos. 1, 2 and 3, have been specially mortgaged to secure a debt, and it is shown that lots Nos. 1 and 2, of the series, are incumbered by prior mortgages, and are entirely covered by a building used as a hotel, and that lot No 3 forms the yard for the hotel, lot No. 3 can not be sold separately from that of Nos. 1 and 2 for the benefit of the mortgage for which all three stand pledged.

Stinson v. Lelievre, 191.

6. A mortgage loses its rank if it is not reinscribed within ten years.

Johnson v. Succession of Lowry, 205.

7. The fact that the records of the mortgage office are shown to have been removed from the place where they were usually kept, and the office closed for two or three years, will not relieve a party from the effect of failure to reinscribe within the time required by law. In a case of this kind, recourse on the part of the party suffering, would lie against the officer for removing the records, and thereby putting it out of his power to have the reinscription made.

Ib.

8. Where judgment has been obtained against the defendant, with recognition of the mortgage on the property specially hypothecated, a devolutive appeal will not suspend execution thereon, nor will the fact that a devolutive appeal is pending prevent the plaintiff, as a judgment creditor, from bringing a direct action to annul and set aside a simulated transfer of other real estate, alleged to have been made by the defendant to his children.

Duncan v. Brandon, 243.

9. The mortgage allowed by law, prior to the adoption of the constitution of 1868, on the property of tutors to secure the minor against an improper disposition of his estate during minority, can only be preserved by the registry of the bond of the tutor in the mortgage office, or by the registry of an abstract of the inventory, certified to by the clerk of the court of the parish where the succession is opened. This record must have been made prior to the first of January, 1870. Article 123, constitution of 1868; act of eighth of March, 1869, sections 10 and 11.

Taylor v. Ealer, 278.

10. The institution of suit on the tacit mortgage prior to the first of January, 1870, does not dispense with the inscription required by the act of 1869. The legal mortgage can only be preserved on

MORTGAGES—Continued.

the property of the tutor by registry in the mortgage office in the manner and in accordance with the forms prescribed by the act of March 8, 1869, sections 10 and 11. *Ib.*

11. A mortgage may be given to secure a debt that has no legal existence at its date, as well as to secure a loan that is to be obtained in the future on the faith of its security. In this case the loan was not made until more than two years had elapsed from the date of the mortgage. Held—That the loan having been made on the faith of the security of the mortgage, it was binding on the property mortgaged to the extent of the amount loaned from the date of the loan. *D'Meza v. Generes*, 285.

12. Subsequent mortgagees have the right to dispute the validity and amount of any prior mortgage. *Ib.*

13. If the validity of a mortgage has been attacked by a subsequent mortgagee, the party against whom the attack is made, must be permitted to show, by evidence, its real character and consideration. *Ib.*

14. An injunction by a subsequent mortgagee, restraining the purchaser from settling with the prior mortgagee, is not a case where a judgment has been enjoined, and no damages will be allowed. *Ib.*

15. The cancellation of the mortgage, as follows, "this mortgage has been canceled on the original by the receipt of Charles McVea, liquidator, as far as the State is concerned," is not a cancellation of the mortgage as to other creditors. In making such inscription on the face of the mortgage, the liquidator acted only on behalf of the State, under a special statute, and his act did not effect the other mortgage creditors of the insolvent corporation, whom he did not represent.

Liquidator of Clinton Railroad Company v. Lee, 287.

16. The renunciation by the wife, in a mortgage given by her husband, does not transfer to the mortgagee her rights of mortgage, but only transfers to him the rank to which her mortgage on the property of her husband was entitled at the time.

Gegan v. Bowman, 336.

17. The renunciation in an act of mortgage by the wife ceases to be evidence against her, if the mortgage is not reinscribed within ten years. Therefore, where a mortgage was given by the husband, with a renunciation of the wife, and afterwards a second mortgage was given without the renunciation of the wife, and the first mortgagee failed to have his mortgage reinscribed within ten years, the mortgage of the wife, being relieved from the effect of her renunciation, by the failure to reinscribe, will take rank over the second mortgage, and the first mortgage having lost its rank by failure to reinscribe, the second will take rank over it. *Ib.*

18. The reinscription of a mortgage after the lapse of ten years, only entitles it to rank as a mortgage from the date of such reinscription. And where the wife has renounced, her consent must be given to the reinscription, otherwise it will be inoperative as against her. *Ib.*
19. Where a stockholder of the Citizens' Bank gave a mortgage on his property to secure the subscription of stock, and to secure a stock loan, under the charter of the bank, which provided that each stockholder should be entitled to a loan of one-half of the amount of his stock, and the mortgage stipulated that the property mortgaged should stand hypothecated for any stock loan so made, it was held that the mortgage included in its securities such stock loan; that the statement in the charter of the bank, that one-half of the amount of the stock was the maximum which the bank was authorized to loan to a stockholder on pledge of his stock, and the recital in the act of mortgage of the number of shares of stock owned by the mortgagor, was sufficiently definite, and operated a notice to all parties of the extent of the incumbrance on the property mortgaged. *Nutt v. Citizens' Bank of Louisiana, 344.*
20. Parties acting in a representative capacity or holding bank stock, and having assumed the obligation of the mortgagor to pay the stock and reimburse the bank for a stock loan, occupy the same position towards the bank that the original mortgagor did, and if there be any doubt, their acts will be interpreted against them. *Ib.*
21. The assumption of a mortgage by a third purchaser, or mortgagee, is not a novation of the mortgage. Novation only takes place when the intention of the parties to novate is distinctly announced. The fact that the bank stock was transferred subsequent to the real estate subject to the mortgage given to secure the payment of the stock, did not affect the mortgage rights of the bank. *Ib.*
22. The mortgage granted by article 3282 of the Civil Code in favor of the tutor on the property of his ward for advances made, has effect against third parties only from the date of inscription. Tacit mortgages exist only in favor of those persons included in the exceptions established by law, and no exception is made in favor of tutors. The mortgages granted in their favor must, to have effect, be recorded. *Boisdore v. Malcolm, 390.*
23. The rank of mortgages, which are required to be recorded to give them validity, must be determined by the date of inscription. *Ib.*
24. The hypothecary right granted by C. C. 1626, in favor of a particular legatee upon the immovables of a succession, is a legal mortgage; and it must be recorded, in order to maintain its priority, as against a conventional mortgage, imposed by the universal legatee, and duly recorded. C. C. 3297. *Ogle v. King, 391*

MORTGAGES—Continued.

25. A mortgage loses its rank if it is not reinscribed within ten years, and a recital in a second mortgage, before the ten years have expired, that a former mortgage has been inscribed against the same property, will not operate a reinscription of the first mortgage, so as to preserve the rank of the first mortgage over that of the second. 21 An. 204. *Rochereau v. Dupasseur*, 402.
26. The fact that the second mortgagee had notice of the existence and inscription of the first mortgage, will not dispense the first mortgagee from the effect of failure to reinscribe within ten years. 21 An. 427. *Ib.*
27. The act of renunciation by the wife of her rights on property ostensibly belonging to the community, does not preclude her from reclaiming it, free from any mortgages or incumbrances placed upon it by the husband, if she shows that it is actually her paraphernal property. *Levy v. Ledoux*, 404.
28. The renunciation of the wife, in an act of mortgage given by the husband, on the separate property of the wife, is a nullity. C. C. 2412. *Ib.*
29. The simple denial by the wife that she derived benefit from an act of mortgage given by her husband and signed by her, on her separate property, is sufficient to put the creditor upon proof that the debt contracted by the act inured to her advantage, or to the advantage of her separate estate. *Ib.*
30. A mortgage given by the husband on the paraphernal property of the wife, with her renunciation, the paper title to which he has acquired by a series of probate proceedings, resulting in a sale of the property, at which he became the purchaser, can not be enforced after the sale made by the order of the probate court has been declared null. In such a case the possession of the property is restored to the wife, unincumbered by the mortgages which the husband had placed upon it, even though the wife had made a renunciation of her rights in the act of mortgage itself. *Ib.*
31. In a suit to settle the rank of mortgages, if the claim of the third opponent did not originate until after the other judgments were rendered and recorded, he can neither contest the reality of the judgments, nor the validity of their consideration. In a contest of this character, evidence is not admissible on the part of the third opponent to show that the consideration of the judgment, which was recorded before the existence of his own claim, was for the sale of slaves. *Hoy v. Scott*, 415.
32. A mortgage debtor can not be allowed, in defense, to a proceeding to enforce the mortgage rights, to urge the plea of domicile in bar of the proceedings *in rem*. *Allen v. Tarlton*, 427.
33. If the debt exists, and the mortgage and privilege have not been legally extinguished, the third possessor can be compelled, by the

MORTGAGES—Continued.

- hypothecary action, to pay the whole debt, or surrender the property. *Ellison v. Her*, 470.
34. If the prayer of the petition, in an hypothecary suit, contains all the material requests required by this form of action, it will not be dismissed because it contains some requests which the law will not grant. *Ib.*
35. In this case, it appears that the act of mortgage, given on lands situated in the parish of Franklin, was regularly recorded in the proper office, in that parish; that, in 1868, after the mortgage was given, the parish of Richland was created by law, and the lands covered by this mortgage were included in the boundaries of the parish of Richland. The mortgage was not recorded in the office of the recorder of mortgages in the parish of Richland. Held—That the law does not require the recording of the mortgage in the new parish thus created, after the inscription in the parish where the land was situated at the time; that the mortgage rights attached to the land from the date of registry in the parish where it was situated, and the subsequent changing of the boundaries, and the creation of a new parish, did not operate a relinquishment of the mortgage, even though it had not been recorded in the new parish. *Ib.*
36. The tacit mortgage allowed by law in favor of minors on the property of their tutors, to secure the faithful administration of their estates, does not attach to property that has come into the possession of the tutor under a deed from a party, who did not himself own the property. *Rind v. Succession of Fluker*, 482.
37. A bond was executed for borrowed money from a trustee, secured by a mortgage on slaves, and the mortgagor sold the slaves to a third person, who, as a part of the price, executed his bond to the trustee, and the trustee thereupon released the original obligor. Held—That the consideration of the latter obligation, as between the trustee and the purchaser, was not a sale of slaves, and was therefore valid. *Fickling v. Marshall*, 502.

OBLIGATIONS.

1. An obligation or bond, acknowledging an indebtedness, and agreeing to pay the interest annually, on a day fixed, together with so much of the principal debt as will make up a fixed amount, which payments are to be made each succeeding year, except in case of failure to make crops of cotton, when the interest only is to be paid, does not fall under the denomination of promissory notes, and is not, therefore, prescribed in five years. *Thompson v. Simmons*, 450.
2. The reinscribing a mortgage from the registry book, within ten years, is sufficient to give notice. The fact that it is a copy of a copy does not invalidate the registry. *Ib.*

OBLIGATIONS—Continued.

3. The doctrine announced in the case of *Sanderson v. Sandige*, 21 An., page 757, is reaffirmed and followed in this case, fixing the amount due on an obligation for the purchase of land and slaves, where payments had been made and credits given before emancipation of the slaves. The rule adopted by the court in that case was, that the amount of the payments made were to be deducted from the whole debt, and the balance due to be divided ratably, and that which was for slaves to be deducted and judgment given for the balance, with a recognition of mortgage on the lands. *Ib.*

OFFICE AND OFFICERS.

1. The office of city notary of the city of New Orleans, not being created or recognized by the charter, is not a municipal office, and the provisions of the act of 1868, No. 156, usually termed the Intrusion Act, can not be invoked in a contest between two notaries for the position. *State, ex rel. Hero, v. Castell*, 15.
2. In a contest for office under the Intrusion Act, a parish judge may, *pro hac vice*, when acting in the place of the district judge recused, exercise all the powers conferred on district judges by the Intrusion Act. *State v. Lewis, Judge of the Eleventh Judicial District*, 33.
3. The capacity of a public officer to perform the duties of his office can not be inquired into collaterally. *Ib.*
4. If the evidence shows that a district judge has, prior to the late war, taken an oath as a member of a State Legislature or other public office of any State, to support the Constitution of the United States, and that after the breaking out of hostilities he has violated his oath by active participation in the rebellion, his right of office and his eligibility to hold the same may be tested by proceedings in the courts in the name of the State, under the Intrusion Act, and the prohibitions contained in the fourteenth amendment to the Constitution of the United States will, in this proceeding, be enforced against him. *Ib.*
5. The issuing of a second commission by the Governor to a public officer will not cure his ineligibility under the first commission. *Ib.*
6. The insertion of the name of a judge in a citation whose title to office is in dispute, will not invalidate the petition or citation. *State, ex rel., etc., v. Head*, 54.
7. In a contest for office under the act of the General Assembly of 1868, No. 156, either party has a right to a trial by jury, and if a special term is ordered, the judge may, when required by either party, order a special jury to try the cause. *Ib.*
8. In case of a suspension from office of the sheriff, by the district judge, for alleged neglect of duty, if the next Legislature, to whom the report of the suspension has been made, in accordance with

OFFICE AND OFFICERS—Continued.

the provisions of act No. 123, approved September 14, 1868, fails to take any action thereon before adjournment, the sheriff is entitled to resume his office again, the same as if the suspension had not taken place. *State v. Schwab*, 562.

9. In a suit to test the right to office under the Intrusion Act, the appeal from the judgment of the court below must be taken, returnable in ten days after the judgment of the lower court. Section 7, act approved March 16, 1870.

State, ex rel. Olay, v. Blandin, 596.

10. Therefore, an appeal taken more than ten days after the judgment of the lower court, in a suit to test the right to an office, will be dismissed, unless it be shown that the fault was not attributable to the appellant. *Ib.*
11. The Governor is the proper representative of the State, and bound to protect her interests. Therefore, in a case where the other officers, such as the Attorney General or other officers, are absent from the State or fail to discharge their duties in taking an appeal, the Governor is bound to intervene in behalf of the State and take the appeal. *State, ex rel., v. Dubuclet, State Treasurer*, 602.
12. An appeal will lie from a judgment against the State when the affidavit shows that the injury done by the judgment is above five hundred dollars. *Ib.*
13. In all cases where an officer of the State, such as the State Treasurer, has a discretionary power to do or not to do any act coming within the range of his duties as an officer, the writ of mandamus will not lie from a court of justice to compel him to perform such an act. *Ib.*

PARISH COURT.

1. The parish court is without jurisdiction *ratione materiae* in a suit, on a moneyed demand, where the amount involved is above five hundred dollars. 21 An. 478, 481.
Heirs of Chaney v. Williams, Administrator, 81.
2. Where a suit has been transferred from the district court to the parish court, and dismissed by the parish court for want of jurisdiction, and an appeal is taken therefrom, the judgment of the parish court will be reversed, and the cause remanded to the district court, to be proceeded with according to law. *Ib.*
3. The parish judge, having admitted a will to probate and ordered its execution, is the only competent authority to appoint a dative testamentary executor. *Succession of Tanner*, 91.
4. The parish court has exclusive original jurisdiction to settle disputes arising from the opposition to an account and tableau of distribution filed by the executor or administrator, regardless of the amount involved in the opposition; but where the validity or

PARISH COURT—Continued.

correctness of the demand is brought in question, either by the executor or administrator on the one side, or the creditor on the other, then the jurisdiction of the parish or district court is governed by the amount involved. *Succession of Bingay*, 101.

5. In the matter of the probating of a will, the parish court has exclusive original jurisdiction, without reference to the amount involved. Constitution of 1868, article 88.

Herbert, Tutor, v. Winn, 109.

6. The parish court has jurisdiction of a suit for the partition of a succession among the heirs, where it has not been accepted unconditionally, even though no administrator has been appointed. Constitution, article 87.

Pennisson v. Pennisson, 131.

7. The parish court has jurisdiction over a contest about the validity of a will, without reference to the amount involved in the testament.

Succession of Pardo, 139.

8. All successions shall be opened and settled in the parish courts. Constitution, article 87. Therefore, the district court is without jurisdiction *ratione materiae* to entertain a cause purely probate in its character, such as the present, having for its object the recognition of the heirs, and establishing their rights, judicially, to the succession. All actions of this character must be brought in the parish courts. 21 An. 364.

Hart v. Hoss and Elder, 517.

9. The parish court is without jurisdiction *ratione materiae* to annul a judgment of the district court, if the amount of such judgment is above five hundred dollars.

Breuning v. Weigel, 593.

PARTNERSHIP.

1. A and B entered into a written contract of partnership to carry on the planting business in the parish of Morehouse. A, one of the partners, made a contract in his own name with Smith & Carr, commission merchants in the city of New Orleans, to furnish supplies, etc., for the plantation in the parish of Morehouse. Smith & Carr took the individual note of A, in the name of Smith, in settlement of the account. A and B settled their partnership at the close of the year, and divided the cotton made on the place. B shipped her part of the cotton to her own merchant. Smith, as holder of the note given by A, brought suit, and sequestered the cotton of B, in the hands of her merchant in New Orleans, alleging that he had a privilege on the cotton for the supplies furnished, which were used to make it. B intervened in this suit, and claimed the cotton as her individual property, and denied that it was subject to the privilege of Smith for supplies furnished. Held—That A, having contracted for the supplies in his own name and given his individual note in settlement of the account, no privilege existed on the crop made in partnership. That the debt

PARTNERSHIP—Continued.

being against an individual, property belonging to a partnership could not be made liable therefor. That the crop having been divided between the partners, that which belonged to and had been taken possession of and shipped by one partner, was not liable for the debts of the other partner, even though it were shown that the supplies furnished by the creditor for which the debt was contracted was used in making the crop.

Smith v. Williams, 268.

2. It would seem that where a plantation has been worked in partnership, no privilege exists in favor of the commission merchant, who has made advances and furnished supplies to one of the partners, on the portion of the crop which belongs to the other partners. To hold the interest of the other partners in the crop liable for the supplies, they must have been furnished to the partnership, and not to an individual, although he be a partner. *Id.*
3. In this case it appears from the evidence, that A and B owned the Pelican Mills in partnership; that in operating said mills they were commercial partners; that C, a third party, loaned A, one of the partners, an amount of money for the use and on account of the partnership, and to be paid by the partnership funds. C brought suit against the partnership for the amount of money loaned, and A, one of the partners, confessed judgment. Execution issued on the judgment thus confessed, and the mill, the partnership establishment, was seized. B, the other partner enjoined the sale. Held—That the judgment having been confessed by one of the partners, for a partnership debt, before the dissolution thereof, the sale of the partnership property could not be restrained by injunction taken out by the other partners.

Grant v. Hyatt, 411.

4. An action for a settlement of a partnership can not be maintained, if the evidence fails to establish the existence of such partnership.

Abadie v. Frechede, 423.

5. Where a partnership exists, the partners have no cause of action against each other for a specific sum resulting from a partnership transaction, until there has been a settlement of the partnership, nor can the maker of a promissory note oppose a claim which he holds against the partnership of which the holder of the note is a member.

Conrad v. Callery, 428.

6. One partner in the planting business, can not sue for, nor recover in his individual capacity, cotton or other produce, made on the plantation, until the partnership affairs have been liquidated, and the proceeds divided. Therefore, the plaintiff in this suit, a partner, can not recover the cotton delivered by the other partners to defendant in payment for supplies furnished to make the crop.

McFarland v. Connell, 481.

PARTNERSHIP—Continued.

7. The right of a creditor of an individual member of a commercial firm to the partnership property, is subordinate to those of the partnership creditors. *Christen v. Ruhlman*, 570.
8. A sale by one partner, of his interest in the partnership, to another partner, in payment of his indebtedness to the firm, before the institution of suit by an individual creditor against the partner who sells, can not be successfully attacked by the individual creditor, because it does not impair his rights. Therefore, if, as in this case, the sale of one partner to the other took place before suit was brought by the individual creditor of the partner who sold, the partner who purchased the interest can successfully resist, by injunction, the sale of the property which formerly belonged to the firm, in payment of the judgment against the partner who has sold his interest. *Ib.*

PETITORY ACTION.

1. In a petitory action the party assailed may inquire into the regularity of the proceedings under an order of seizure and sale by which the attacking party acquired title to the property, and if the formalities required by law have not been observed in making the sale under the order, the title of the sheriff is a nullity. *Surgi v. Colmer*, 20.
2. A party claiming property must recover on the strength of his own title, rather than on the weakness of his adversary's. *Pritchett v. Coyle*, 57.
3. In a petitory action, if the plaintiff establish a good and valid title to the land claimed, and the defendant holds under a title translativ of property, but it is shown that the title of his vendor is defective and void, the plaintiff will recover the land, but the defendant, not being aware of the defects in his title at the time of purchase, can not be condemned to pay rents. *Brooks v. Wortman*, 491.
4. A party purchasing real property, in good faith, under what he believes to be a valid title, is entitled, on eviction, to recover the value of the improvements he has put upon it. But, after making his claim for a certain amount expended for improvements, and failing to amend his petition, in order to augment his demand, he must lose the overplus. C. P. 156. *Ib.*
5. The prescription of five years, urged by a possessor of lands in good faith, only covers the informalities which may have occurred in the execution of a decree or other sufficient mandate to sell real estate, but this prescription can not be urged by the possessor to cure manifest fundamental defects in the title of his vendor. *Ib.*

PLEADINGS.

1. The plea of general denial, and the further special plea that the goods purchased, for which the note sued on was given, were rotten and worthless, admits the capacity of the plaintiffs to stand in judgment. *Boston Belting Company v. Simonds*, 75.
2. A defendant is not permitted to file an amended answer changing the substance of, or contradicting the original answer. Nor will the simple averment of the defendant, unsupported by affidavit, that the new matter set up in the amended answer was unknown to him at the time of the filing of the original answer, entitle him to have it filed, if the record makes it probable that he knew the facts as well at the filing of the first answer as he did afterwards. *Case v. Watson*, 350.
3. Where the original answer of the defendants admits that there was a sale and transfer of the goods from the plaintiffs to defendants, and the question at issue between the parties is, was the transfer legitimate, as alleged by plaintiffs, or fraudulent, as alleged by defendants, an amended answer alleging that there was no sale, will not be permitted after the cause is fixed for trial. Such amendment being calculated to change the issue raised by the original answer. *Bancker v. Marti*, 461.
4. If the verdict of the jury is not responsive to the pleadings and the evidence in the record the cause will be remanded with instructions to try the issue raised by the pleadings. *Ib.*

PRACTICE.

1. Where the certificate of the clerk of the court below shows that a portion of the evidence adduced has been lost, and is not contained in the record of appeal, the case will be remanded to be tried anew. *Mulligan v. New Orleans*, 11.
2. The question of the identity of a party who sues in a representative capacity, must be pleaded specially *in limine litis*, and before issue is joined. *Beyris, Widow and Administratrix, v. Spor*, 16.
3. In proceedings for the expropriation of private property for public use, all the formalities prescribed by law must be strictly observed. *City of Jefferson v. Delachaise*, 26.
4. Evidence or affidavits not offered or filed in the lower court can not be filed or noticed in the Supreme Court. *Keenan v. Freret*, 31.
5. A judgment creditor can not proceed by rule to make the sureties of the sheriff liable for money collected by him on a writ of *fieri facias*. *Soule v. Worsham*, 78.
6. On trial of a rule to dissolve an injunction, the judge can not receive proof to establish a ground for injunction not alleged in the petition. In all such cases the plaintiff is restricted to the allegations in the petition. *Stockett v. Johnson*, 89.

PRACTICE—Continued.

7. The creditors or heirs of an estate may proceed by rule to compel the curator to pay the twenty per cent. interest per annum on the amount of the funds drawn from the bank by him without any order or authority from the court, but they can not couple with such rule a demand that the delinquent curator shall be dismissed from office. Acts of 1855, Sec. 2, No. 90, page 78.
Succession of Williams, 94.
8. Proceedings to remove a delinquent curator from office must be commenced by petition and citation. C. P. 1018. *Ib.*
9. In a proceeding under this statute to recover the twenty per cent. interest per annum on the amount withdrawn from the bank by the curator, besides any special damage suffered, judgment can not be rendered against him and his sureties *in solido* for the amount so withdrawn. *Ib.*
10. Where the defendant, in answer to a demand, avers a settlement in full between the parties, the burden falls upon him to make good his defense. *Coleman v. Mollere, 106.*
11. A third opponent can not be permitted to aver the nullity of the judgment under which property has been seized, and at the same time claim the proceeds of the sale made under that judgment.
Provosty v. Carmouche—Levy, Third Opponent, 135.
12. Third parties holding shares of stock, belonging to or standing in the name of a stockholder, in pledge, can not be made parties, or be proceeded against by rule in a proceeding by a purchaser of the stock at sheriff sale, to compel a transfer of the stock on the books of the company. In such a case the pledgees have an interest in the transfer of the stock, and must be made parties by petition and citation. *Weiser v. Smith, 156.*
13. A purchaser of real estate assumed the payment of certain mortgage notes as a part of the price. He afterwards obtained from the holder, by an instrument in writing, an extension of the time of their payment. Held—That the extension of time of payment of the notes by a contract in writing was not a novation of the notes and mortgage. *Frank v. Hardee, 184.*
14. The averments in an exception which has been taken as an answer to the merits, are judicial admissions, which bind the party making them, and judgment may be rendered on such admissions, on motion, without a regular trial on the merits. *Ib.*
15. Where no bills of exception nor assignment of errors are attached to the record, and the appellant has filed no brief in the case, damages will be given the appellee for frivolous appeal.
Uter v. Dumonteil, 197.
16. The right to proceed by rule is confined to incidental matters which may arise in the progress of a suit, except in summary cases, where this form of proceeding is sanctioned by law.
Hernandez v. Hugh, 245.

PRACTICE—Continued.

17. The want of citation is fatal to all subsequent proceedings in the cause. *Ib.*
18. The judge of the court *a qua* may, in the exercise of a sound discretion, refuse a continuance, on the application of one of the litigants, to obtain answers to interrogatories, where the interrogatories themselves are manifestly frivolous, and intended for delay only. *Moncheux v. Mistrot*, 421.
19. A bill of exceptions to the charge of the judge to the jury must be made before the jury retires, reduced to writing and signed by the judge, otherwise it will not be noticed on appeal. C. P. 517; 5 R. 216. *Hathecock v. Gray*, 472.
20. This is an action to annul a transfer of a judgment under the allegations of fraud and deceit practiced by the defendant. Held—That under these allegations parol evidence was admissible to show the fraudulent and simulated character of the transfer. *Nicholson and Husband v. Hendricks*, 511.
21. The objection that the suit is premature, because the plaintiff has not offered to return the money received for the transfer of the judgment before bringing suit to annul it, if not urged in the court below, will not be noticed on appeal. *Ib.*
22. The affidavit of the plaintiff in a motion for a new trial, in an action of boundary, sets forth that, after judgment was rendered, material evidence was discovered, which he could not obtain before, although due diligence was used, viz: That he can prove by R. W. Derve, surveyor of the city of Shreveport, that he has carefully surveyed and examined the lines affecting the rights of parties, and that he is satisfied Hall, the surveyor, never ran the line E. D., and if permitted to testify he will show that Hall could not have run the line in accordance with his order. Held—That the affidavit, setting forth these facts, brought the plaintiff strictly within the articles of the Code of Practice, which provide for such relief, and that a new trial should have been granted. C. P. 560, 561; 2 An. 225. *Robison v. Howell*, 524.
23. The legal representatives of the defendant having adopted the allegations in the answer filed by the deceased, will not be permitted afterwards to file an amended answer contradicting the allegations in the first answer. Nor will the amendment be permitted if not made within the time allowed by the rules of the court. *Case v. Watson*, ante p. 350. *Spyker v. Hart*, 534.
24. An amended answer, particularizing the fraudulent practices and misrepresentations charged in the original answer, may be filed at any time before the cause is set down for trial. *Bujac & Girardy v. Williamson*, 538.
25. Evidence offered by defendants to show that other parties claimed the patent rights which plaintiffs professed to own, and that suit

PRACTICE—Continued.

- had been instituted for an infringement of it, was excluded by the court *a qua*. Held—That the ruling was correct, for the reason that the testimony was irrelevant, and that there was no allegation in the answer warranting such proof. *Ib.*
26. Under the allegations of fraud and deception contained in the answer, the evidence of the defendant is admissible to show all the circumstances tending to establish the charges. *Ib.*
27. In this case a rule is taken by the purchaser of property at public sale to compel the sheriff to make a title. The sheriff answered that the purchaser claimed to be a first mortgage creditor on the property sold to a large amount, and offered the balance after deducting the amount of his mortgage; that the other mortgage creditor had filed oppositions contesting the rank of the purchaser to the first mortgage; that he could not pass the adjudication because he could not determine the rank of mortgages. Held—That the oppositions never having been tried in the lower court could not be considered on appeal; that a decision on the rule before the oppositions were disposed of would be premature; that in a case like this the ends of justice and the rules of correct practice require that the case should be remanded and cumulated, and tried with the oppositions. *Buron v. Cage*, 573.
28. A motion, in the nature of an answer to a motion to dismiss an appeal for want of proper parties, which asks that the effect of the appeal be restricted to the parties who have been cited, will not be granted by the Supreme Court. *Succession of Pollock*, 574.
29. The discovery of a better defense after judgment than the one urged on the trial, such as that the title of the assured to the steamer was fraudulent and simulated, is not good cause for annulling it.
Merchants' Mutual Insurance Company v. Pointèr, 620.
30. The averment in an action of nullity, that had the insurance company known of the fraudulent and simulated character of plaintiff's title to the vessel at the time the insurance was effected, they would not have taken the risk, is a good defense to urge at the trial. But it is not a valid basis for annulling the judgment which has been obtained without fraud or other ill practices by the judgment creditor on the trial. *C. P.* 607. *Ib.*

PRESCRIPTION.

1. An acknowledgment or waiver by the parish treasurer of a warrant or claim against the parish will not operate an interruption of prescription, unless it is shown that he was duly authorized to make such waiver. *Hynes v. Police Jury of Madison Parish*, 71.
2. An ordinance of the police jury, authorizing the president to waive prescription of debts against the parish, will not protect the holder

PRESCRIPTION—Continued.

- of a warrant against the plea of prescription, although it has been duly acknowledged by the treasurer. Under such an ordinance the president alone is competent to make the waiver. *Ib.*
3. A written obligation, signed by the auditor of parish accounts, styled a certificate of indebtedness, is prescribed by the lapse of five years. C. C. 3505.
Winkle v. The Police Jury, Parish of Pointe Coupée, 76.
4. Stocks pledged to a bank as security for a loan of money constitute a standing acknowledgment of the debt, and prescription is interrupted during the time of the pledge.
Police Jury of West Baton Rouge v. Duralde, 107.
5. The maxim *contra non valentem agere non currit prescriptio*, being a rule of equity, can not be invoked to overturn express provisions of statutory enactments. *Jaquet v. Levert & Co., 111.*
6. Article twenty-one of the Civil Code only permits the courts to decide according to equity in cases where there is no express law. *Ib.*
7. Prescription exists only by the authority of positive enactments, and there is no place in the whole doctrine of limitations for the application of the rules of equity. *Ib.*
8. Prescription does not run against a stock loan note, secured by the pledge of bank stock of the bank from which the loan was obtained. *Citizens' Bank v. Knapp, 117.*
9. An acknowledgment written on the back of a promissory note by the drawers, who are also indorsers, will not relieve the holder from the effect of the plea of prescription made by the other indorsers. *Citizens' Bank v. Murdock and Williams, 130.*
10. The right to recover of a banker for failing to protest a note whereby the indorser is discharged, is only prescribed by ten years. C. C. 3508. *Eichelberger v. Pike, 142.*
11. The action to compel an agent to account is prescribed by ten years. C. C. 3508. *Wagoner v. Phillips, 151.*
12. A decree of the court ordering the liquidator of an insolvent corporation to collect the assets as speedily as possible is not prescribed by ten years. *Per curiam*: The judgment directs the liquidator to discharge a duty attached to his office. It is not a moneyed judgment.
Port Hudson Railroad Company v. Whitaker, 209.
13. Modeste Bernard, administrator, brought suit in his official capacity, on a promissory note due the estate he represented. The note contained the following clause: "With the privilege of postponing the payment three years after the death of the said Mrs. Bernard." The defendant opposed the plea of prescription. Held—That the clause authorizing the postponement of payment did not operate a suspension or interruption of prescription.
Bernard v. Ledet, 252.

PRESCRIPTION—Continued.

14. If the record shows that the court below has erred in maintaining the plea of prescription, it will be reversed on appeal, and, if no other defense is set up, the Supreme Court will give judgment in conformity with the demand.

Bauer v. Succession of Martin, 326.

15. The answer of the debtor to a clerk of the creditor, who presented a bill for payment, "that he will attend to it," is not a sufficient acknowledgment to interrupt prescription.

Marqueze v. Bloom, 328.

16. The prescription of five years does not apply to an obligation to pay money contained and expressed in the act of sale. In such a case the prescription of ten years is applicable. C. C. 3508; 3 An. 46; 13 An. 294.

Merritt v. Merle, 257.

17. A twelve months' bond, given by the purchaser of property at sheriff's sale, being an unconditional obligation to pay money at a specified time, is prescribed in five years from maturity.

Chastant v. Strong, 410.

18. An offer to pay a promissory note in a worthless currency, such as Confederate notes, unaccepted by the holder, will not interrupt prescription.

McCranie v. Murrell, 477.

19. The payment of a promissory note to a receiver of the so-called Confederate States, under compulsion, during the late war, in an unlawful currency, does not interrupt prescription, and the action to recover on the note is therefore barred by five years.

New York Belting and Packing Company v. Jones, 530.

20. An action for rent is prescribed by three years. C. C. 3503.

Harrison v. Meyer, 580.

21. A suit that has been commenced and afterwards voluntarily discontinued by the plaintiff does not interrupt the current of prescription. C. C. 3485.

Ib.

22. A military order which permitted the bringing of suits for rent, but suspended the progress thereof, can not be invoked by the lessor to defeat the plea of prescription.

Ib.

23. If more than five years are allowed to elapse from the date of maturity of drafts; to the service of citation, and no interruption is shown, the plea of prescription will be maintained.

Sampson v. Gillis, 591.

24. The action to enforce the payment of a debt against a third party who has assumed its payment in a notarial act, is not barred by the prescription of one or three years.

Brou v. Becnel, 610.

25. The prescription of one year in bar of an action in damages for a quasi offense must be computed from the day on which the injury was caused, without computing the day on which it was received. C. C. 3430, 3467.

Chesnut v. Hughes, 615.

SEE AGENT—*Smith v. Coon*, 445.

SEE DAMAGES—*Chesnut v. Hughes*, 615.

PRIVILEGE.

1. The factor or commission merchant has a lien and privilege on the crop for moneys advanced to aid in making it. Acts of 1867, p. 351.
Owners of the Steamer General Quitman v. Lackara.—Ober, Atwater & Co., Intervenor, 70.
2. The privilege on a vessel in favor of the furnisher of supplies, or the crew, is not effected by the sale of the interests of the different shareholders.
Sibley v. Fernie, 163.
3. The vendor of an immovable, in the settlement of the succession of the vendee, is entitled to be paid in preference to every other claim, except those charges which have been necessary to procure the sale of the thing. Of these charges attorneys' fees form no part.
Succession of Markey, 265.
4. The privilege of the lessor on the crop made on the plantation for the year, and that of the furnisher of supplies to make the crop are concurrent.
Moore v. Gray, 289.
5. Before the passage of the act of 1867, the laborers on the plantation had no privilege on the crop to secure their wages, so, in this case, when the crop was made in the year 1866, no lien or privilege can be set up on the crop or its proceeds by the laborers who made it.
Ib.
6. The lien of the laborers who have made the crop under contract for a portion thereof, is inferior, in rank, to that of the lessor and the furnisher of supplies.
Ib.
7. In this case the planter had to his credit on the books of his merchant a certain amount of money. He purchased his supplies for the plantation from the merchant, with other articles of merchandise not entitled to a privilege. On trial, the judge *a quo* instructed the jury to impute this credit to that portion of the account of the planter which was privileged. Held—That the judge erred; that the moment the debt reached the amount of the credit, compensation took place; that by operation of law the credit became extinguished, regardless of the question of privilege.
Ib.
8. A consignee of cotton is bound to comply with the conditions imposed upon him by the principal in relation to the appropriation of the proceeds, and the acceptance of a draft drawn by the owner of the cotton gives the factor a preference over the proceeds to that extent.
Levering v. Clark, 376.
9. Where advances have been made and supplies have been furnished for several years to carry on a plantation, the merchant is only entitled to a privilege on the crop of each year, on such amounts as are shown to have been used in making the crop of that year.
Martin v. Lastrapes, 380.

PRIVILEGE—Continued.

10. The privilege given to a furnisher of supplies attaches to every fibre of the cotton made during the year, as fast as it matures, and a sale, or other disposition, made of any portion thereof, by the planter, will not defeat this lien. Therefore, if the planter has sold or transferred a portion of the crop to the laborers, in payment of their wages in making the crop, the assignee or transferee of the cotton by the laborers, in payment of a debt they owe, will not enable such third party to hold the cotton in opposition to the claim of the furnisher of supplies.

Bres v. Cowan, 438.

PROHIBITION.

1. In a case where the property of a succession has been legally transferred to and placed in the possession of the heirs, a writ of prohibition will lie from the appellate court against the probate judge, pending the appeal from an order appointing a dative testamentary executor.

State, ex rel. Widow and Heirs of Pearson v. The Parish Judge of the Parish of Jefferson, 61.

2. A writ of prohibition will not issue to restrain the execution of a judgment of the court below, where the record shows that the bond given for the appeal is insufficient in amount to operate a *supersedas* pending the appeal.

State, ex rel. Wassell, v. Judge of Fourth District Court, Parish of Orleans, 115.

PROVISIONAL COURT.

1. During the late war between the United States and the so-called Confederate States, and during the pendency of hostilities, the President of the United States, being Commander in Chief, was competent, when the military forces had captured and taken possession of any one of the insurgent States, to constitute and cause to be established a judicial tribunal, and to vest such tribunal with all the necessary authority for the administration of justice in said State, under the Constitution and the laws. A judicial tribunal thus created and recognized by proclamation of the commanding general of the district within which it was vested with jurisdiction, was a court of record, and all its orders, decrees and judgments were entitled to full faith and credit, the same as any other legally constituted court of record.

Burke v. Tregre, 629.

2. The courts of Louisiana will take judicial notice of all orders and proclamations issued by commanding generals during the time that the city and State were under military control. Therefore, the proclamation of General Shepley, Military Governor of Louisiana, giving official notice of the organization of an United States Provisional Court for the State of Louisiana, and of the appoint-

PROVISIONAL COURT—Continued.

ment by the judge thereof of a clerk, prosecuting attorney and marshal, was sufficient to authorize said officers to act in their several capacities; and the purchasers of property at judicial sale made under the authority and decree of said Provisional Court, through the marshal thereof, were not required to look into the mode or regularity of his appointment. *Ib.*

3. In this case the deed made by the marshal was lost or destroyed; the book of deeds of the marshal could not be found. The evidence showed besides that a writ of *feri facias* had been ordered in writing by the attorney for plaintiff, indorsed by the clerk, issued; that the *feri facias* could not be found after diligent search. Held—That under this showing the certified copy of the deed of the marshal from the records of the parish recorder was admissible in place of the original, and that such copy made full proof of what it contained. *Ib.*

PROVISIONAL SEIZURE.

1. Where property has been provisionally seized, and it is afterwards ascertained judicially that it was not subject to the provisional seizure, the sheriff can not be held liable on account of the insufficiency of the security on the release bond given by the owner of the property. *Sanarens v. True*, 183.
2. The sheriff can not be made liable for having released property, provisionally seized, without sufficient security, where it is shown by a judicial decree that the property released was not liable to the provisional seizure. *Ib.*
3. Where mules and other movable property, used by the lessee in working the plantation, have been provisionally seized, at the suit of the lessor, for the rent of the place, and released by the sheriff on bond, before judgment, the privilege of the lessor is not thereby lost, and the same property may be seized a second time and sold to satisfy the privilege recognized by the judgment, provided the lessee has not parted with the possession and ownership of the property more than fifteen days prior to the last seizure. *Haralson v. Boyle*, 210.
4. The privilege on the movables of the lessee, for the rent of the plantation, can not be enforced by the lessor against an innocent third purchaser, if more than fifteen days have elapsed from the date of purchase from the lessee, before the seizure. *Ib.*

PUTTING IN MORA.

1. Parties are put *in mora* by demanding that they do that which, in a legal sense, they ought to do and can do. *Escoubas v. Louisiana Petroleum and Coal Oil Company*, 280.
2. A distinction exists in this regard between a *modus* and a suspensive potestative condition. The former is obligatory and payable,

PUTTING IN MORA—Continued.

and if the party bound is passively violating his obligation, he must be put in default before an action will lie. The latter is one whose accomplishment depends on personal choice; the party on whom it is imposed is free to accomplish it or not; and to put him in default would be a vain thing, since it would be to demand that he should do what he is under no obligation to do. *Ib.*

3. An agreement was made between plaintiffs, owners of mineral lands, and the assignor of defendants, of a twofold character, including a license to mine, and a lease for ten years in case of successful discovery. The defendants lost all rights thereunder by the lapse of time, no workable quantity of petroleum having been discovered within a period limited by the contract. The plaintiffs then agreed to refrain from declaring a forfeiture of this contract for ten years from its date, provided the defendants would carry on the search for petroleum constantly and without cessation. Held—That the latter agreement was conditional; that its conditional was suspensive and potestative, and that when the defendants failed to carry on their search for petroleum, the plaintiffs were entitled to declare the forfeiture of the contract by suit, and claim possession of their lands, without a formal putting in default. *Ib.*

RES JUDICATA.

1. The plea of *res judicata* will be maintained where the evidence shows that the title to the property in controversy has been finally adjudicated upon in a suit between the same parties.

Leatt v. Heirs of Williams, 81.

2. A party having set forth his demand by intervention, and his rights having been passed upon, is estopped from prosecuting a direct action on the same demand against the same party. In such a case the plea of *res judicata* will prevail.

Shelton v. Brown, 162.

3. The plea of *res judicata* can not be invoked against a demand that has never been judicially passed upon. *Brou v. Becnel*, 610.

SALE.

1. Parol testimony is not admissible to explain, contradict or vary a written contract of sale, nor can witnesses be heard to show what the understanding of the Finance Committee, the Common Council of the city of New Orleans, or the community in general, was, about the meaning of an ordinance authorizing the sale of city property. *Case v. Berwin*, 321.
2. In a sale of property by the city of New Orleans, authorized by ordinance of the Common Council, the city fixed the terms in so far as to require the purchaser to pay one-fifth of the amount bid

SALE—Continued.

in cash, at the time of sale, the balance to be paid in installments to suit the purchaser, with mortgage retained on the property sold, until final payment, giving, however, the purchaser the right of paying the whole amount in cash, and, in that event, the city was to take in payment her matured obligations at par. The purchaser declined to avail himself of this privilege of paying the entire indebtedness at the time of sale, but gave his note for the amount in dollars. Held—That not having paid the amount in city notes at the time of sale, he could not now claim to discharge the note in anything but lawful currency; that the right to pay in city notes was forfeited by his failure to avail himself of the conditions prescribed. *Ib.*

3. Stipulations in an act of sale, in favor of third parties, can not be revoked after they have been accepted by those in whose favor they have been made, except in cases where just cause is shown, such as a failure of consideration of the contract, and the like.

Brandon v. Hughes, 360.

4. In this case, a sale of real property was made, for a fixed price, with a stipulation by the vendee that he assumes all the mortgages existing on the property, and the amount of the mortgages is above the stipulated price of the purchase, for which difference the vendor executed his promissory note, in favor of the vendee, and afterwards, and before payment, he absconded. Held—That by the terms of the contract, this amount was to have been paid before the vendee became bound to the mortgage creditors; that the vendor, by absconding, had placed himself in default, and that, by the failure of the vendor to comply with the conditions on which the sale depended, the vendee was entitled to have the sale rescinded, and to be discharged from any liability to the mortgage creditors, on account of the purchase of the property.

Ib.

5. Property that has been purchased by authentic act and passed into the possession of the vendee, can not be seized under a writ of *fieri facias* against the vendor. In such a case the sale of the property thus seized will be restrained by injunction taken out by the purchaser. The case would be different if the seizing creditor shows that the sale is simulated.

Chidester v. Simonds, 374.

6. Steam boilers, used in a saw mill on a plantation, do not constitute a part of the realty, and the owner may recover them or their value from a purchaser of the place, although he may have paid the vendor their full price. In such a case, the vendee is entitled to judgment against his vendor in warranty for the amount he is condemned to pay the owner of the boilers.

Slack v. Gay, 387.

SALE, JUDICIAL.

1. A purchaser at sheriff sale of bank stock, can compel a transfer of the shares of stock on the books of the bank, although, the seized debtor may owe the bank at the time an amount above the amount of the stock purchased, evidenced by his notes held by the bank.

Bryon v. Carter, 98.

2. A clause in the by-laws of a bank, adopted by the board of directors, subsequently to the issuing of the stock, that "no transfer of stock shall be made when the party is indebted to the bank as principal, indorser or security on any obligation that is due, as long as it remains unpaid," is not binding on the judgment creditors of the stockholders.

Ib.

3. A proces verbal of the sale of real estate by the order of the probate court has no effect against third parties, or seizing creditors, until it is recorded or registered in the parish where the property is situated. Nor will an injunction lie to defeat the sale of property seized by a third party, unless the act of sale of the seized debtor has been registered in the parish before the date of the seizure.

Lyons v. Cenas, 113.

4. A formal decree of a competent court, will protect the purchaser of property at probate sale, and he can not set up in defense, to a demand to comply with his bid, that there being minor heirs interested, the sale should have been authorized by a family meeting. Such defense if available at all, must be urged against the administrator's tableau.

Succession of George Kaiser v. Wilson, 175.

5. In a proceeding under an order of seizure and sale the sheriff must give notice three days before he makes the seizure. Seizure first and notice afterwards is irregular, and will be set aside on appeal.

Birch v. Bates, 198.

6. A sale of property by the sheriff, without giving notice to the seized debtor as required by law, is a nullity, and conveys no title whatever to the purchaser.

Ib.

7. A purchaser of property at probate sale has the right to retain in his hands, an amount of the purchase money equal to the amount of unpaid taxes recorded against the land purchased.

Moore v. Moore, 226.

8. A judicial sale of real property, to satisfy a mortgage, extinguishes all the subsequent mortgages. Therefore, if the evidence and declarations of the parties show that the defendant was the real purchaser of the land at sheriff's sale, under the prior mortgage, the subsequent mortgages are extinguished.

Willis v. Willis, 447.

9. A purchaser of property at public sale will be held responsible for his bid, unless he show that the vendor has been guilty of such deception or fraud as would mislead a prudent purchaser.

Lamothe v. Hausse, 525.

SALE, JUDICIAL—Continued.

10. In this case the property sold was advertised in the official journal, in the English language, as required by law. It was also advertised in the French language, in which an erroneous description of the property was given. Both notices were read at the sale by the auctioneer, without objection being made at the time as to the discrepancy. The defendant in this suit bid off the property, and afterwards refused to comply with his bid by paying the amount. The property was re-offered, and failed to bring the amount of the first bid at the second offering. Held—That the bidder at the first sale must be condemned to pay the difference.

Ib.

11. The purchaser of personal property, such as a mule, at a public sale, made under the regulations prescribed for the sale of estrayed animals, gets a good title thereto, even though it may be shown that the animal was originally stolen. C. C. 3474.

Thompson v. Cullinane, 586.

12. A purchaser of property at judicial sale is only required to show a judgment of a competent court, an execution, and the deed of the officer making the sale.

Burke v. Tregre, 629.

SALE, SYNDIC.

1. The syndic of ceded property, having regularly advertised and offered it for sale, and the purchaser, having failed to comply with his bid by paying the amount, may expose the same for sale a second time on the same day, without giving further notice by advertisement. C. P. 689.

New Orleans Mutual Insurance Company v. Ruddock, 46.

2. Property offered at syndic sale a second time, on the same day, on account of the first purchaser failing to comply with the terms, is not so exposed at the risk of the purchaser at first offering, and the syndic can not recover of the purchaser at first offering the difference in amount which the property brings at second offering below that of the first. In such a case a third party purchasing the property at second offering can only be required to pay the amount bid, without reference to the amount bid at the first offering.

Ib.

SEIZURE AND SALE.

1. In a petitory action the party assailed may inquire into the regularity of the proceedings under an order of seizure and sale by which the attacking party acquired title to the property, and if the formalities required by law have not been observed in making the sale under the order, the title of the sheriff is a nullity.

Surgi v. Colmer, 20.

2. A sale of property under an order of seizure, after the mortgage debtor has died, without making the heirs or legal representatives parties, is a nullity.

Ib.

SEIZURE AND SALE—Continued.

3. A party having acquired title and possession of real property at probate sale, regularly made, will hold it against a sheriff's title made under an order of seizure, in which the formalities required by law have not been observed. *Ib.*
4. A party wishing to stay the execution of a judgment directing the seizure and sale of mortgaged property by a suspensive appeal, must give bond within the time allowed in an amount one-half over and above the amount of the order, the same as in an ordinary judgment for a fixed amount.
State, ex rel. Bankhead, v. Judge of Seventh District Court, parish of Orleans, 35.
5. If the district judge has committed an error in fixing the amount of the bond for a suspensive appeal from an order of seizure and sale, the appellee is entitled to proceed with the execution of the judgment, and a writ of prohibition will not issue restraining him from executing the order pending the appeal. *Ib.*
6. To constitute a valid seizure of a plantation cultivated as such, and occupied as a residence, the sheriff must, whether under attachment or *feri facias*, take the property into his possession and custody, and in case of attachment, the return must show that this rule has been complied with. The statement by the officer that he has attached according to law, is not sufficient.
Kilbourne v. Frelsen, 207.
7. The sale of a plantation by the sheriff under a judgment rendered on attachment without giving notice to the occupant or owner, is a nullity; but if the attaching creditor can show on trial of the injunction taken out by the party in possession under a recorded title, that the sale is simulated, the case might be different. *Ib.*

SEQUESTRATION.

1. Where it is shown on the trial that a sequestration legally issued, the party obtaining it is not liable in damages, on account of the surety, whom the judge has approved, being subsequently ascertained not to be worth the amount of the bond.
Isaacson v. Wall, 243.
2. Where an intervenor causes certificates of stock to be sequestered from the plaintiff in the action, the latter becomes practically a defendant in sequestration, and, as such, has a right to bond the property.
State, ex rel. City of New Orleans, v. Judge of the Eighth District Court, Parish of Orleans, 260.
3. This right to bond exists whether the writ be directed against "property," as mentioned in C. P. 271, or against "obligations and titles," as mentioned in C. P. 272. In either case, the ownership being in dispute, the conservatory effect of the writ is to

SEQUESTRATION—Continued.

compel the possessor, if he wishes to retain possession, to give security in favor of the claimant, who demands possession. *Ib.*

4. In a suit to recover the damages resulting from the unlawful sequestration of a lot of sugar, the plaintiff must show, by undisputed evidence, the actual amount of loss resulting from the fall in the price during the time it was detained under seizure. Damages will not be allowed for an alleged deficiency in weight, if the evidence is vague and uncertain, but a reasonable amount will be allowed, as attorney's fees, for setting aside the sequestration and getting possession of the property.

Walker v. Miltenberger, 375.

SEPARATION FROM BED AND BOARD.

1. The decree of separation from bed and board does not dissolve the bonds of matrimony, and the surviving widow thus situated, if in necessitous circumstances, may recover the amount of one thousand dollars, allowed by the act of 1852, from the estate of her deceased husband. C. C. 133.

Succession of Liddell—Opposition of Liddell, 9.

2. If a reconciliation takes place after the decree of separation, the judgment is a nullity. C. C. 149. *Ib.*

SHERIFFS AND DEPUTIES.

1. In a suit to make the sheriff liable on a bond for the release of property under seizure, parol evidence is admissible to show that the sheriff has never parted with the possession of the property under seizure. The sheriff may show also, in a case of this kind, under what circumstances the bond made its appearance in the record. *Ware & Son v. Wilson, 102.*
2. Where the return of the sheriff on the writ of *fiery facias* contradicts the recitals in the face of the bond of release, the entries made by the sheriff will control. *Ib.*
3. A bond of release, executed by the seized debtor, is of no force until the seized property is released by the sheriff. *Ib.*
4. In a rule against the litigants for costs, the sheriff will be restricted to the charges allowed by law, and if any of the items are overcharged they are forfeited. *Ib.*
5. A sheriff who received from his predecessor an amount of money, made on execution, for which he gave his receipt as sheriff, for the amount in dollars without any qualification, can not set up against the demand of the judgment creditor that the sum received was Confederate notes. *Sadler v. Gayle, 155.*
6. The sheriff can not be made liable for having released property, provisionally seized, without sufficient security, where it is shown by a judicial decree that the property released was not liable to the provisional seizure. *Sanarens v. True, 183.*

SHERIFFS AND DEPUTIES—Continued.

7. The sheriff is authorized by law to pay his own costs and those of the clerk of the court who issued the process out of the funds realized by the sale of property under a writ of *feri facias*, and the debtor can only claim the surplus after such costs are paid.
Connors v. Avery, 330.
8. A rule against the sheriff to pay over certain amounts in his hands, realized from the sale of property under seizure, will be discharged if the evidence does not show the amount he is entitled to retain for costs.
Ib.

SLAVES, HIRE OF.

1. The abolition of slavery by the sovereign power put an end to all contracts depending for their existence on that condition, and as the contract for the hire of the slaves could not have been made without the existence of a state of slavery, the destruction of that relation by the sovereign power destroyed the contract, and the obligation given as the evidence of such contract is null and void.
Rodriguez v. Bienvenu, 300.
2. Slavery, as it formerly existed in the United States, only gave to the owner the right to the labor of the slave during his life, and the destruction of slavery carried with it the destruction of that right. It makes no difference whether the contract is made for the sale of the slave, or whether it is for the hire. In the one case it is for the services of the slave for an indefinite period, and in the other it is for a fixed period of time. The contract is equally null in both cases.
Ib.
3. Defendant purchased slaves at succession sale, for which he gave his promissory notes; at their maturity plaintiff loaned defendant a sufficient amount to pay them, for which defendant gave his note; defendant applied the money, thus obtained, to the payment of the original notes for the purchase of the slaves; plaintiff brings suit on the note, to which the defendant opposes the plea of a slave consideration. The evidence shows that the consideration of the last note was loaned money. Held—That the plaintiff must recover; that the fact that defendant applied the money loaned to the payment of the slave notes, did not entitle him to the benefit of the plea of a void consideration.
Seely v. Blanchard, 409.
4. Obligations given for the hire of slaves are illegal, and can not be enforced.
Wise v. Hill, 469.
5. A contract for the hire of slaves can not be enforced. (Ante page 300). But if a partition of the succession has been made between the coheirs, as in this case, and one of the heirs is found to be indebted to the succession for the hire of slaves, the amount of such indebtedness was properly deducted by the executors from the share coming to such heir.
Succession of Ross, 480.

STAMPS.

1. The failure of a litigant to place the required internal revenue stamps on the petition and affidavit in an attachment suit, under the acts of Congress, of 1864, or to have the documents stamped, as required by the collector of the district, will work the nullity of the proceedings. *Hoyt v. Benner*, 353.
2. An attachment suit, brought in 1865, while the internal revenue law was in force, requiring stamps to be placed on all petitions and affidavits in any judicial proceeding, will be dismissed on exception, if the amount of stamps required by the act of Congress has not been placed on the documents and pleadings before the filing of the suit. After suit has been filed and the process issued without the stamps being affixed, they must be placed there by the instructions of the collector of the district, under penalty of nullity. The placing them on the documents by the party, after suit is filed and the opposite party cited, will not avail. *Ib.*

SUBROGATION.

1. Where suit has been filed and afterwards a transfer of the claim is made on the record to another party, the defendant, to enable him to plead in reconvention a draft accepted by the original plaintiffs, which he holds, must show that he acquired the draft before he received notice of the transfer.
Falls, Howell & Co. v. Thomas & Powell, 173.
2. This is an hypothecary action by a surety on a twelve months' bond, who has paid the debt, to force a sale of the property mortgaged, to reimburse him. The application is opposed by the defendant, who alleges that he was a co-surety on the bond, and therefore the plaintiff is only entitled to recover his portion; that subrogation does not take place by operation of law between co-sureties. The evidence shows that the defendant was not legally bound as co-surety on the twelve months' bond which plaintiff has paid. Held—That, not being legally bound on the bond as surety, he could not oppose the sale of the property mortgaged for the benefit of the real surety, who had paid the debt.

Landers v. Tuggle, 443.

SUCCESSION.

1. A judgment of the probate court, declaring a seizure of succession property null, on the ground that nothing tangible had been seized, is conclusive against the seizing creditor, and the probate court is competent to pass on the merits of an opposition to a tableau filed by the seizing creditor, notwithstanding an appeal is pending from the judgment declaring the seizure null.
Succession of Millaudon, 12.
2. Where the heirs in possession allege, in opposition to the appointment of a dative testamentary executor and administrator, that there is no estate to be administered, a suspensive appeal will lie

SUCCESSION—Continued.

from the judgment of the probate court dismissing the opposition; and a writ of prohibition will issue, staying all further proceedings in the cause pending the appeal. Articles 580 and 1059 of the Code of Practice, and article 1113 of the Civil Code, authorizing the provisional execution of a judgment appointing executors, etc., pending the appeal, where there is a contest between two or more persons for the right of preference to the appointment, do not apply in a case where the question is succession or no succession.

State, ex rel. Marin et al. v. Parish Judge of Plaquemines, 23.

3. Where the heirs have been legally put in possession of the estate, by a judgment of the court, the property can not afterwards be placed under the control of an executor or administrator to be administered as succession property.

State, ex rel. Widow and Heirs of Pearson, v. The Parish Judge of the Parish of Jefferson, 61.

4. In a case where the property of a succession has been legally transferred to and placed in the possession of the heirs, a writ of prohibition will lie from the appellate court against the probate judge, pending the appeal from an order appointing a dative testamentary executor. *Ib.*

5. To enable the second husband to recover on behalf of his minor children, issue of the marriage, one thousand dollars from the succession of the first husband, the evidence must show that the deceased wife was in necessitous circumstances at the death of her first husband. The fact that her child by a second marriage is in necessitous circumstances, gives it no claim against the succession of her first husband. *Leatt v. Heirs of Williams*, 81.

6. A third party who has acquired the interest of a portion of the heirs in a succession, can not plead such interest in compensation in a suit brought by the administrator to recover a note due the estate. *Naquin v. Durac*, 249.

7. Cotton or other produce cultivated and made by the survivor, after the dissolution of the community, does not fall into and form a part of the succession; nor are the fees of clerks or other officers of the court, for duties performed in opening and administering the estate, chargeable to the proceeds of such cotton or other produce. *Succession of Woodward*, 305.

8. If a writ of sequestration has issued by a creditor of the estate against the cotton produced by the survivor, the same will be set aside on the ground that the cotton was the individual property of the survivor, and not a part of the estate. *Ib.*

9. A judgment of the court ordering a partition of succession property in kind, to be made in conformity with a report of experts

SUCCESSION—Continued.

and demanded by all parties in interest, will not be set aside because a new inventory and appraisal was not made, as required in such cases, by article 1248, Civil Code.

Barnett v. Bernstein, 394.

10. The surviving wife has thirty days within which to make a choice between renouncing and accepting the succession of her husband. But after this delay she still has the right of renunciation, which is continuous until she has been compelled by an action to make the choice. Therefore, no personal judgment can be rendered against her until the action by the creditor, to compel her to make the choice, has been passed upon.

Titche v. Lee, 435.

11. In a suit by the surviving wife against the succession of her deceased husband, to enforce her paraphernal rights, if the evidence shows that certain lands have been purchased as her separate property, with her separate funds, which she was administering independently of her husband, and which had never come under his control, she will be decreed to be the separate owner thereof, although the lands were acquired during the community. Succession of Wade, 21 An. 343.

McCay v. Boatner, 436.

12. The filing of a tableau of debts by an administrator is an acknowledgment of their existence which interrupts prescription.

Succession of Arick, 501.

13. An item upon such tableau for hire of slaves, will, under the existing jurisprudence of the State, be disallowed.

Ib.

14. Though a purchase be made by a member of a commercial firm outside of its ordinary operations, yet if it be made for the benefit of the firm and brought to the knowledge of the other partner, who does not repudiate it, but promises to pay the note given in the firm name for the price, he will be bound *in solido*.

Ib.

15. Such a promise to pay is not a promise to pay the debt of a third person, and may be established by parol.

Ib.

16. Where the nature of the evidence and the condition of the transcript renders it impossible to determine with accuracy the credits to which the succession is probably entitled, the court will remand the cause.

Ib.

SUPREME COURT.

1. The Chief Justice of the Supreme Court, or the senior Justice thereof, may, in vacation, on application for a writ of mandamus against a court of inferior jurisdiction, grant a rule *nisi* against such judge, ordering him to show cause, on a day fixed at the next regular term of the court, why the writ should not issue.

State, ex rel. Southern Bank, v. Judge of the Eighth District Court, Parish of Orleans, 581.

SUPREME COURT—Continued.

2. A rule *nisi*, or order of the Supreme Court, directing a court of inferior jurisdiction to show cause on a day fixed, why a writ of mandamus should not issue compelling him to grant an appeal in the case, is not a judgment of the court. Therefore, such order may be granted in chambers and signed by the Chief Justice or the senior Justice thereof. *Ib.*
3. The Supreme Court has appellate jurisdiction only, and the right of appeal is secured to every litigant by the constitution. It therefore becomes the duty of the Supreme Court to protect litigants against all encroachments upon this right by inferior jurisdictions. *Ib.*

SURETY.

1. A party who indorses a note as surety is not entitled to notice of dishonor by the principal.
Adams & Co., in liquidation, v. Gordon and Denis, 41.
2. The surety is entitled to have the property of his principal discussed before proceeding against him, if he furnish a sufficient amount of money to pay costs of proceedings. *Ib.*
3. A surety on an official bond of a constable, wishing to avail himself of the plea of discussion, must point out the property of his principal and furnish the means to carry on the discussion.
Heath v. Shrempp and Frederick, 167.
4. Where judgment has been rendered against a constable for damages, a general denial by the sureties on his bond, only puts at issue the existence of such judgment. *Ib.*
5. A surety on the official bond of a constable of the city of New Orleans, given while the city was under military rule, is not discharged from liability because the bond was not accepted by the recorder and board of aldermen, as required by law. The military authority having made the appointment, and permitted the party to act, must be presumed to have approved the bond. *Ib.*
6. In this case the appellee took a rule on the appellant, to test the solvency of the surety on the bond. The appellant, as is alleged, fearing that he could not sustain the solvency of the surety, abandoned the appeal. Held—That the abandonment of the appeal for this reason did not release the surety on the bond.
Simonds v. Heinn, 296.
7. As a general rule, no proceedings can be had against the surety on an appeal bond, if the *fiery facias* has been returned into court before the return day. But where the return of the sheriff on the writ shows that demand was made and the judgment debtor had gone into bankruptcy, thereby putting it out of the power of the judgment creditor to pursue him any further under execution. Held, That the liability of the surety became fixed from that moment;

SURETY—Continued.

that no further proceeding under execution being possible against the judgment debtor, the creditor was at liberty to proceed by rule against the surety on the appeal bond. *Ib.*

8. A sale of succession property, for the purpose of effecting a partition among the heirs, is not an act of administration, although it be made by order of the court, through the administrator, and the sureties of the administrator are not liable to the heirs for loss which they have sustained on account of his failure to take good security for the credit portion of the price.

Hebert v. Hebert and Levert, 308.

9. A surety signs the bond of an administrator with reference to the law regulating his duties as such, and securing his recourse against the latter, in case of failure to administer the estate in conformity with such requirements. But if the heirs provoke a sale of the property, for the purpose of effecting a partition, and change the time for the payment of the credit price from that fixed by law for the sale of property by the administrator, they thereby make the conditions of the surety more onerous, and he is discharged, even if the proceeding be one in which he could be held liable under any circumstances. *Ib.*

TAXES AND TAX COLLECTORS.

1. The lien and privilege given by law on the lands in favor of the State and parish for the taxes, expires by two years from date of assessment. *Buckner v. Masters, Tax Collector, 246.*
2. Section sixty-three of the revenue law of 1869, which authorizes the tax collectors to seize and sell the property of defaulting taxpayer, and prohibits the courts from issuing any process interfering with tax collectors in the discharge of their duties, does not apply to taxes that were assessed and became due before the passage of the law. Acts of 189, p. 1569, sec. 63. *Ib.*
3. An ordinance of a police jury of a parish, passed while the constitution of 1864, was in force in this State, levying a specific tax of one dollar on every four hundred pounds of cotton made in the parish, in one year, is in opposition to article 124 of said constitution, which declares that taxation shall be equal and uniform. Therefore, if such a tax has been assessed and collected it may be recovered from the parish, by suit, by the party who has paid it. *Sims v. Parish of Jackson, 440.*
4. The revenue act of ninth of March, 1869, which prohibits all courts from enjoining or otherwise interfering with State tax collectors in the discharge of their duties in collecting licenses or taxes, has no application to parish taxes or parish tax collectors. *Gilmer v. Hill, 465.*
5. The act number thirty-five, approved sixteenth of March, 1870, which appropriates two thousand dollars for the payment of costs

TAXES AND TAX COLLECTORS—Continued.

in suits, where the State is a party, and loses the case, does not apply to the payment of costs in suits brought by tax collectors to enforce payment of taxes against delinquents. Therefore, the Auditor of Public Accounts is not authorized, nor can he be compelled, by mandamus, to warrant against this appropriation, in favor of a clerk of a district court for his costs that have accrued in suits brought by tax collectors, to enforce the payment of taxes due the State. *Mahan v. Sundry Defendants*, 583.

TUTORS AND TUTORSHIP.

1. A merchant who has supplied a minor with wearing apparel under the authorization and approval of the tutrix, may enforce the claim against the minor after emancipation, provided the same has not been included in the settlement of the tutrix's account, and the amount does not exceed the revenues of the minor. In such a case the tutrix has the right to bind the minor to the extent of the revenues, without the approval of a family meeting, and the minor having come into the possession of her estate is bound also.

Giquel v. Daigre, 137.

2. Where heirs, by intervention, seek to have their rights established against their tutor, and a judgment against the sureties on the tutor's bond, and the court *a qua* fails to pass on the prayer against the sureties, the Supreme Court will, on affirming the judgment dismissing the intervention, reserve the rights of the heirs to proceed against the sureties on the tutor's bond.

Moore v. Moore, 226.

3. A jewelry merchant sold a lot of costly jewelry to Mrs. Daigre for the use of her daughter, then a minor, for which she paid a portion of the price in cash and gave her individual note for the balance. Suit was brought against the maker of the note in her individual capacity and as tutrix of her minor daughter, whom, it was alleged, was the recipient of the jewelry. Judgment was rendered against her individually, and judgment of non-suit as tutrix. (See 19 An. 190.) After majority of the minor, this suit was brought against her to recover the amount of the note, on the allegation that the jewelry was purchased for her use; that she had received it, and still possessed and owned it. The evidence given on trial failed to establish the fact that the jewelry was purchased for the daughter, or that she received it as her individual property. Held—That the jeweler could not recover the price from the minor, nor could he recover the amount from the tutrix out of the minor's estate, that his only recourse was against the tutrix in her individual capacity. *Fendler v. Daigre*, 239.

4. The omission to name a creditor in the citation of appeal from a judgment homologating a tutor's account will not vitiate the appeal.

Smith, Tutor, 253.

TUTORS AND TUTORSHIP—Continued.

5. If a judgment homologating the tutor's account, shows an indebtedness in favor of the minors with mortgage for eleven thousand dollars, a third party has a right to appeal therefrom if he has a judgment against the tutor with mortgage for over five hundred dollars. The parish court is competent to grant an order of appeal from a judgment homologating a tutor's account, although a similar judgment may have been rendered by the clerk of the district court, under the act of 1855, before the organization of the parish court. In such a case both judgments must be embodied in the record of appeal, and the parish judge is the only competent authority to grant the order. *Ib.*
6. An acknowledgment by the husband in the form of a receipt, that he received from the wife the amount of paraphernal funds therein expressed, is conclusive between the husband and wife or their heirs, and is *prima facie* proof as to all other parties. Such evidence will authorize a judgment in favor of the heirs in a suit against their father in his capacity of tutor. *Ib.*
7. The mortgage of the minor on the property of his tutor to secure the faithful administration of his estate, and to cover the indebtedness contracted by the tutor to the minor on account of the community and separate property of the minor, which he has acquired by purchase, attaches from and after the date of the appointment and qualification of the tutor. *Ib.*
8. A third party in an opposition to the homologation of a tutor's account can not be heard to contest the validity of an adjudication which occurred prior to the existence of his debt. *Ib.*
9. A tutor owes five per cent. per annum on the funds from the date of receipt, and when the accounts are liquidated, five per cent. on the aggregate amount from the day the accounts are closed. *Ib.*
10. If the tutor charge himself with the revenues of the minor, he is entitled to credit for the expenses of the minor to the extent of the revenues. *Ib.*
11. A third party, a mortgage creditor, can only have the judgment of the court below corrected on appeal, in so far as it appears upon the face of the record to grant a mortgage prejudicial to his mortgage. No amendment or change of the judgment can be made between appellees. *Ib.*
12. The general rule is that a tutor can not transfer, by indorsement, the promissory notes, bills, or other paper held by him in his representative capacity, except by the advice of a family meeting; but such a transfer, it has been held, is not an absolute nullity, and if the indorser shows that the transfer was made in the interest of the minor in whose favor the rule is made, the title to the note is sufficiently established, and the holder may recover.

Woodbridge v. Pope, 293.

TUTORS AND TUTORSHIP—Continued.

13. The tutor has no legal right to create a debt against the minors, or their estate, without the authority of the judge and the advice of a family meeting. Nor can the minors, or their estate, be held liable for a debt created by the sale of property to the tutrix in her individual capacity. *Ib.*

USURY.

1. In a contract made between parties residing in Mississippi, by which notes and mortgage are given on property situated in Louisiana, to be entirely executed in this State, the question of usury must be governed by the laws of Louisiana, where the contract is to have effect. *Duncan v. Helm*, 418.
2. The act of 1860, abolishing the penalties in the act of 1854 (re-enacted in 1855), against usurious contracts, only relieved parties from such penalties for making usurious contracts after its passage. It is not retrospective, and has no effect on usurious contracts made before its passage. *Ib.*
3. Payments made on obligations must be applied to that which is lawfully due, and not to usurious interest; and where an over payment of the debt due has been made, excluding the unlawful interest, it may be reclaimed by the debtor, if demanded within one year. *Ib.*

USUFRUCT.

1. The surviving widow of her deceased husband is entitled to the usufruct of all the community property until the second marriage. Act of March 25, 1844. The natural fruits or such as are the produce of industry, hanging by branches or by roots, at the time when the usufruct is open, belong to the usufructuary. C. C. 538. Therefore the surviving wife and usufructuary is not chargeable with, nor accountable to the heirs for the growing crop in the field and not gathered at the opening of the succession. Nor is she responsible in her capacity of natural tutrix to the minor heirs, for the rents and revenues arising from the use of the lands, stock and farming utensils, from the date of the opening of the succession up to the time that she contracts a second marriage.
Tutorship of the Minor Mattie E. Davis, 497.
2. The surviving widow having lost the usufruct by contracting a second marriage, is only accountable to the heirs for the value of the personal property belonging to the community at the time of the second marriage, unless it be shown that she has made an improper use of it. She is entitled to the deduction arising from the deterioration of the property while in her possession as usufructuary. *Ib.*
3. The surviving widow and natural tutrix having lost the usufruct by contracting a second marriage, becomes accountable to the

USUFRUCT—Continued.

heirs for the rent of lands occupied by her and belonging to the community. But if it be shown by evidence that, owing to the existence of a state of war in the country, the lands could not be worked, and therefore they were not cultivated for a period of three years, she is not accountable for the rent nor interest on the same for that period of time. *Ib.*

WALL IN COMMON.

1. A party erecting a wall on the line of his premises, which is afterwards used as a wall in common by the adjoining proprietor, can only recover from the party using it as a wall in common, one-half of the original cost of building it. C. C. 672; 20 An. 553.

Florance v. Maillot and Wood, 114.

WAREHOUSE KEEPER.

1. In a case like this, where the defendant, the keeper of a public warehouse, received a lot of cotton on storage, and gave a receipt therefor, it is not sufficient excuse for non-delivery, when demanded, for him to show that soldiers were encamped near where the warehouse was situated, and that it was commonly believed that they and the freedmen were stealing cotton; that the back door of the warehouse could easily have been forced open at night, and the cotton taken out, and then closed again, without being discovered in the daytime. *Thomas v. Darden, 413.*
2. It seems that a warehouse keeper will be held responsible for the loss of property stored, in all cases where he fails to show that the loss occurred without his fault. *Ib.*

WILLS.

1. A nuncupative will under private signature, passed in the presence of three witnesses, when a greater number might have been obtained, is null and void. *Fugua v. Dawson et al., 82.*
2. The parish court has jurisdiction over a contest about the validity of a will, without reference to the amount involved in the testament. *Succession of Pardo, 139.*
3. A witness who does not understand the language in which the testament is written is not a competent witness to the will. *Ib.*
4. A nuncupative will, under private signature, is null, if it does not contain the number of subscribing witnesses required by law, who are competent to testify that it was dictated and written in their presence, or that it was read to them at the time of signing. *Ib.*
5. A bequest in a will to a religious corporation falls, if the legatee is not capacitated to take, at the death of the testator. *Succession of Hardesty, 332.*
6. In this case the legatee was a religious body, known as the Baptist Church of Clinton, not incorporated at the death of the testator. Held—That the legatee not being incorporated at the death of the

WILLS—Continued.

testator was not capacitated to receive the legacy, and the subsequent incorporation of the church, designated in the will as the legatee, would not enable it to take, because the dispositions of the will must take effect *in presenti*. *Ib.*

7. In the testament of William Silliman appeared the following clause: "Item 8.—I give and bequeath to the children of my late brother, Thomas Silliman, one-fourth of the remainder, to be divided equally with those that may be living at my death." The children of a daughter of Thomas Silliman, who had died before the date of the testament, brought suit to be recognized as legatees under the will. Held—That the term "children," as used in this testament, only included the children of Thomas Silliman, that might be living at the death of the testator, and did not include the descendants of those who had died before him; that their mother, having died before the date of the will, was not embraced among the legatees, and her children could not succeed to her; that the grandchildren could not inherit under this clause in the will.

Wharton v. Silliman, 343.

8. A bequest in favor of slaves is null, and can not be enforced by the legatees against the heirs. *Barrow v. Heirs of Bird*, 407.
9. The law of 1857, which prohibited the emancipation of slaves, applied as well to the heirs as to the testator; and the act of the heirs, in confirmation of the clause in the will directing the emancipation of the slaves named as legatees, was without legal effect, on account of its being in contravention of a prohibitory law.

Ib.

WITNESSES.

1. A witness who does not understand the language in which the testament is written is not a competent witness to the will.

Succession of Pardo, 139.

2. A nuncupative will, under private signature is null, if it does not contain the number of subscribing witnesses required by law, who are competent to testify that it was dictated and written in their presence, or that it was read to them at the time of signing.

Ib.

3. A witness on the stand can not be compelled to produce a private letter about which he is being interrogated, although it is alleged that it goes to show that the draft pleaded in reconvention does not belong to the defendants.

Falls, Howell & Co. v. Thoms & Powell, 173.